PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

No. 10-5400

ORIGINAL

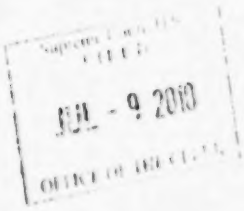
ALEJANDRA TAPIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.



MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(7) and S. Ct. R. 39, petitioner, Alejandra Tapia, asks leave to file the attached Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit without pre-payment of fees or costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed pursuant to 18 U.S.C. § 3006A in the district court and on appeal to the Ninth Circuit.

Respectfully submitted,

Dated: July 9, 2010

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Attorney for Petitioner

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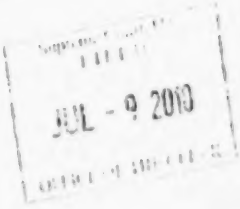

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[1]I would like to thank Jaymes Sanford for his help in writing this petition. Mr. Sanford will be a third year law student at Howard University in the Fall.

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QUESTION PRESENTED

May a district court give a defendant a longer prison sentence to promote rehabilitation, as the Eighth and Ninth Circuits have held, or is such a factor prohibited, as the Second, Third, Eleventh, and D.C. Circuits have held?

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRA TAPIA,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Ms. Alejandra Tapia respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinion Below

The decision of the court of appeals is an unpublished decision. It is attached as Appendix A.

Jurisdiction

The judgment of the court of appeals was entered on April 16, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory Provision Involved

18 U.S.C. § 3582(a) provides, in relevant part, the following:

> Factors to be considered in imposing a term of imprisonment.--The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

INTRODUCTION

This petition presents this Court with the opportunity to address a clear split among the circuits: May a district court give a defendant a longer prison sentence to promote rehabilitation?

The circuits are sharply divided over the issue. On one end of the spectrum lie the Eighth and Ninth Circuits, which allow rehabilitation to be used as a factor in deciding the length of a defendant's prison sentence, once the court decides that a prison sentence is appropriate. *See United States v. Hawk Wing*, 433 F.3d 622, 629–30 (8th Cir. 2006);*United States v. Duran*, 37 F.3d 557, 561 n.3 (9th Cir. 1994). On the other end of the spectrum are the Second, Third, Eleventh, and D.C. Circuits, which do not allow rehabilitation to be used as a factor in deciding the length of a defendant's prison sentence. *See In re Sealed Case*, 573 F.3d 844, 849 (D.C. Cir. 2009); *United States v. Manzella*, 475 F.3d 152, 159 (3d Cir. 2007); *United States v. Harris*, 990 F.2d 594, 596 (11th Cir. 1993); *United States v. Maier*, 975 F.2d 944, 946 (2d Cir. 1992).

Ms. Tapia's case presents an excellent example of the disparate treatment among the circuits. The Ninth Circuit affirmed Ms. Tapia's prison sentence, even though the district court admitted that a factor in its sentencing calculus was its desire to make sure Ms. Tapia was in prison long enough to qualify for the Bureau of Prison's drug treatment program. In other words, the district court gave Ms. Tapia a longer sentence to promote her rehabilitation. While this is currently appropriate in the Ninth Circuit, it is not in the Third, Eleventh, and D.C. Circuits. Each has reversed sentences under identical circumstances concerning the BOP's drug treatment program. *See In re Sealed Case*, 573 F.3d at 849; *Manzella*, 475 F.3d at 159; *Harris*, 990 F.2d at 596. Moreover, such a sentence could not stand in the Second Circuit, which has reversed a sentence under similar circumstances. *See* Maier, 975 F.2d at 946.

Accordingly, this Court should grant this petition to resolve this entrenched circuit split. In the alternative, this Court should hold this case in abeyance until it issues a decision in *Pepper v. United States*, Case No. 09-6822, which involves a similar issue. Once it issues a decision in *Pepper*, this Court should remand this case to the Ninth Circuit in light of that decision.

STATEMENT OF THE CASE

A. Petitioner's crime

In January 2008, Ms. Tapia, the petitioner, and her friend were driving from Mexico into the United States. At the border, an immigration official questioned both about their plans. The official noticed that Ms. Tapia's friend was acting nervous. He also smelled gasoline. That prompted him to scrutinize the car more closely. He eventually found two individuals—later determined to be illegal aliens—concealed in the car's gas tank compartment. Ms. Tapia was then arrested.

Ms. Tapia would thereafter be indicted on two counts: (1) bringing in illegal aliens for financial gain and aiding and abetting in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2 and (2) bringing in illegal aliens without presentation and aiding and abetting in violation of 8 U.S.C. § 1324(a)(2)(B)(iii) and 18 U.S.C. § 2.

Two days after Ms. Tapia's arrest, the district court released her and ordered her to comply with various conditions.

In March 2008, Ms. Tapia failed to show up in court for a motion hearing. A bench warrant was then issued for her arrest. She was apprehended six months later, when she was found in an apartment that contained methamphetamine, a shotgun, and mail that belonged to other individuals.

Thereafter, the Government filed a superseding indictment, adding a third count for bail jumping in violation of 18 U.S.C. § 3146.

Three months later, Ms. Tapia was convicted on the two counts of alien smuggling and one count of bail jumping.

B. Petitioner's sentencing

At sentencing, the district court determined that Ms. Tapia's Guideline range was 41 to 51 months.

Ms. Tapia asked to be sentenced to three years in prison, the mandatory minimum penalty. She argued that a higher sentence would be greater than sufficient to meet the congressionally mandated goals of sentencing, given the abuse she had suffered throughout her life and given the fact that she had never served even a year in prison before.

The district court acknowledged that the physical and sexual torment Ms. Tapia had suffered was a mitigating factor. The court also expressed concern about the fact that she had failed to appear earlier in the proceedings and was then found with a gun, drugs, and stolen mail.

The court then mentioned that he thought that Ms. Tapia needed to take part in the 500-hour drug treatment program the Bureau of Prisons offers in some of its facilities to some prisoners: "The sentence has to be sufficient to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program."

Shortly thereafter, the court announced a sentence of 51 months, focusing on the importance of the drug treatment program:

> I am going to impose a 51-month sentence[:] 46 months [for alien smuggling] plus five months for the bail jump[.] [O]ne of the factors that affects this is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program, number one.

The court then discussed the importance of deterrence, given Ms. Tapia's escalating criminal

conduct. Thereafter, the court asked Ms. Tapia's counsel if he needed to go through any of the other sentencing factors and counsel responded "no."

The court then again returned to the drug treatment program, stating: "The court . . . strongly recommends[] that she participate in the 500 Hour Drug Program and that she serve her sentence at FCI Dublin/Pleasanton. ¶ I recommend that institution because I think they have the appropriate tools and rehabilitation, people there to help her, to start to make a recovery here."

The court also ordered Ms. Tapia to serve three years of supervised release. Among the conditions of her release is that she participate in a drug abuse program.

On appeal to the Ninth Circuit, Ms. Tapia contended that the district court had erred by speculating that she would be allowed to enter into the drug treatment program. Ms. Tapia pointed out that it was up to the discretion of the BOP whether she could enter the program and the district court should therefore not have considered her potential placement in the program as a sentencing factor. Ms. Tapia also noted that 18 U.S.C. § 3582(a) prevented a district court from relying on rehabilitation in selecting a prison sentence and that at least two circuits had held that such a prohibition meant a court could not consider the BOP's drug treatment program in selecting a defendant's sentence. *See In re: Sealed Case*, 573 F.3d 844 (D.C. Cir. 2009); *United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007). She noted, however, that the Ninth Circuit had reached the opposite conclusion in *United States v. Duran*, 37 F.3d 557 (9th Cir. 1994). She conceded that *Duran* controlled and asked to "preserve the issue of whether *Duran* is rightly decided for en banc and Supreme Court review."

In an unpublished memorandum decision, the Ninth Circuit affirmed Ms. Tapia's sentence by, among other things, citing to *Duran*. *See* Appendix A.

Reasons for Granting the Petition

In 1984, Congress made a comprehensive change to the structure of federal sentencing. This change came after Congress decided to abandon the "outmoded rehabilitation model" of the previous sentencing structure to face the reality that "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting." S. Rep. No. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221, *quoted in United States v. Manzella*, 475 F.3d 152, 159 (3d Cir. 2007). The changes were codified in the Sentencing Reform Act of 1984, the statute that governs a district court's sentencing discretion. 18 U.S.C. §§ 3551 *et seq.* (2006). One way in which the Sentencing Reform Act revised the old sentencing process is by instructing the Sentencing Commission to reject imprisonment as a means of promoting rehabilitation. 28 U.S.C. § 994(k) (2006). Congress reinforced this concept by instructing courts to avoid using rehabilitation as a factor for selecting a term of imprisonment or its length:

> The court, in determining whether to impose a term of imprisonment, *and*, if a term of imprisonment is to be imposed, in *determining the length of the term*, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that *imprisonment is not an appropriate means of promoting correction and rehabilitation*.

18 U.S.C. § 3582(a) (emphasis added).

According to the Senate report, Congress did this "to discourage the employment of a term of imprisonment on the sole ground that a prison has a program that *might* be of benefit to the prisoner." S. Rep. No. 98-225, at 95 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3302 (emphasis added). As the Second Circuit put it, "Congress wanted to be sure that no defendant was locked up in order to put him in a place where it was hoped that rehabilitation would occur." *United States v. Maier*, 975 F.2d 944, 946 (2nd Cir. 1992).

The prohibition against using *imprisonment* as a way to achieve rehabilitation did not mean that Congress abandoned rehabilitation as an overall goal for *sentencing*. While Congress prohibited the consideration of rehabilitation in selecting a prison sentence, it requires courts to consider rehabilitation when selecting the defendant's overall sentence. Of the sentencing factors listed in 18 U.S.C. § 3553(a) that courts must taken into account, one requires them to consider what sort of sentence would provide the defendant "with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). Congress's command in section 3582 – the section block quoted above – is consistent with its command in section 3553(a). Read together, Congress has ordered courts to consider rehabilitation in sentencing a defendant, but has banned them from facilitating that goal through imprisonment. Congress armed district courts with a series of sentencing options besides imprisonment. *Manzella*, 475 F.3d at 158. Probation, fines, victim notice, restitution and supervised release are all forms of sentencing. 18 U.S.C. §§ 3551(b), 3555, 3583, 3663). Congress did not prohibit rehabilitation when considering these other forms of sentencing. *Manzella*, 475 F.3d at 158. As a result, a court could craft a supervised release plan that would, post-release, help to rehabilitate the defendant.

Despite the clarity of the statute's language and the supporting legislative intent, a circuit split has developed regarding the applicability of rehabilitation as a reason for imprisonment. The Second, Third, Eleventh, and D.C. Circuits are in agreement that rehabilitation is not an appropriate consideration for deciding whether imprisonment should be imposed or deciding the length of the defendant's prison sentence. *See Maier*, 975 F.2d at 946-47; *Manzella*, 475 F.3d at 158; *United States v. Harris*, 990 F.2d 594, 596 (11th Cir. 1993); *In re Sealed Case*, 573 F.3d 844, 849 (D.C. Cir. 2009). On the other hand, the Eighth and Ninth Circuits have interpreted § 3582 to mean that rehabilitation can be considered when selecting the length of a defendant's prison sentence. *United States v. Duran*,

37 F.3d 557, 561 (9th Cir. 1994); *United States v. Hawk Wing*, 433 F.3d 622, 630 (8th Cir. 2006).

The circuits that have determined that rehabilitation cannot be considered in selecting a defendant's prison sentence have just followed the plain language of 18 U.S.C. § 3582 that "imprisonment is not an appropriate means of promoting correction and rehabilitation." For example, in *Manzella*, the Third Circuit vacated a defendant's sentence because the district court, as here, had imposed a prison sentence so that the defendant would qualify for the 500-hour drug treatment program; in doing so, the court stated that "[a]llowing a judge to issue a . . . term of imprisonment based on the uncertain placement . . . in a rehabilitative programs [sic] is a practice Congress was unwilling to endorse." 475 F.3d at 158. Additionally, the Eleventh Circuit in *Harris* vacated the district court's imposition of consecutive sentences to allow the defendant time in federal prison to enter a drug treatment program, explaining that "[r]ehabilitative considerations have been declared irrelevant for purposes of deciding whether or not to impose a prison sentence and, if so, what prison sentence to impose." 990 F.2d at 596 (internal citation and quotation marks omitted). The Second Circuit also rejected rehabilitation as an imprisonment factor: "[R]ehabilitation may not be a basis for incarceration but must be considered as a basis for sentencing . . . ." *Maier*, 975 F.2d at 947. Most recently, the D.C. Circuit – which was likewise reviewing a district court's sentencing decision that factored in the BOP's drug treatment program – accepted the plain language interpretation of the statute as well, stating that it agreed "with the Third and Second Circuits that sentencing courts may not treat rehabilitation as a reason for a longer term of imprisonment." *In re Sealed Case*, 573 F.3d at 849.

Conversely, the Eighth and Ninth Circuits have concluded that rehabilitation is a permissible reason for determining a defendant's length of sentence. The Ninth Circuit in *Duran* affirmed the defendant's sentence, even though the district court used rehabilitation as a factor for determining the

length of the defendant's sentence; it reached that conclusion by reasoning that "[o]nce imprisonment is chosen as a punishment[], § 3582 does not prohibit consideration of correction and rehabilitation in determining the length of imprisonment." The Eighth Circuit has also adopted this interpretation, holding that "[b]ecause the district court considered §3553(a)(2)(D) in determining the length of the sentence of incarceration rather than whether to incarcerate, we find no error." *Hawk Wing*, 433 F.3d at 630. The Eighth Circuit, however, offered no analysis beyond a citation to *Duran*. *See id.*

The Eighth and Ninth Circuit decisions, however, contradict the plain language of § 3582, which provides that "*imprisonment* is not an appropriate means of promoting correction and rehabilitation" for both "determining whether to impose a term of imprisonment *and* . . . in determining the length of the term." (emphasis added). Textually, if the phrase "imprisonment is not an appropriate means of promoting . . . rehabilitation" modifies the clause "determining whether to impose a term of imprisonment," it must also be true that the phrase modifies the clause "in determining the length of the term" by the use of the conjunction "and." *See In re Sealed Case*, 573 F.3d at 849. Moreover, legislative history is no help to these courts' position, since that history supports the plain language of the statute. Indeed, the plain meaning of the statute best reflects Congress's intent to eliminate incarceration as a medium for promoting rehabilitation and to protect defendants from terms of imprisonment based on rehabilitation programs – programs like the BOP's drug treatment program – that is outside of the judge's control. S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221

Indeed, as the Third Circuit observed, "[i]t is unclear what legal basis" the Eighth and Ninth Circuits have for their position. *Manzella*, 475 F.3d at 159. It is possible the courts were confused because Congress ordered to courts to take rehabilitation into consideration when crafting a defendant's sentence in § 3553(a)(2)(D) confusion that would stem from assuming that

imprisonment is the only sentencing option. As discussed above, there is no conflict that must be resolved by the courts from reading § 3582(a) concurrent with § 3553(a)(2)(D). Section 3553 contains factors that must be considered for *sentencing*, while § 3582 are factors that must be considered for a term of *imprisonment*. Harmonizing the language of the two statutes, it is clear Congress intended to prohibit the promotion of rehabilitation by imprisonment, but saw that rehabilitation is a necessary goal and should be achieved by other methods of sentencing. *See* 18 U.S.C. §§ 3553(a)(2)(D), 3582(a), 3551.

Furthermore, the Eighth and Ninth Circuits analyses prohibiting consideration of rehabilitation in deciding whether to sentence the defendant to a term of prison but allowing consideration of rehabilitation in selecting the length of a defendant's sentence—makes a distinction without a difference. As the D.C. Circuit explained, if "imprisonment is not an appropriate means of promoting rehabilitation, how can *more* imprisonment serve as an appropriate means of promoting rehabilitation?" *In re Sealed Case*, 573 F.3d at 849. Simply put, whenever a district court decides to "keep a defendant locked up for additional months is, as to that month, in fact choosing imprisonment over release." *Id.* at 850. Any additional time a judge adds to a sentence for purposes of access to a corrective or rehabilitative program is failing to recognize that incarceration is not an appropriate means for promoting rehabilitation. *Id.*

Ms. Tapia's case presents an excellent example of how this circuit split affects sentencings. Under *Duran*, the district court in this case did not commit any error by considering rehabilitation—specifically, Ms. Tapia's eligibility for the BOP's drug treatment program—in selecting a prison sentence. On the other hand, the Third Circuit, Eleventh Circuit, and the D.C. Circuit each reversed sentences under identical fact patterns. *See In re Sealed Case*, 573 F.3d at 849; *Manzella*, 475 F.3d at 159; *Harris*, 990 F.2d at 596.

This Court should resolve the circuit split and uphold the plain language of § 3582, banning rehabilitation as a reason for deciding whether a term of imprisonment should be given *and* for deciding length of imprisonment. The Eighth and Ninth Circuits' understanding of § 3582 conflicts with both the plain language and legislative intent of the statute, fails grammatical and logical understanding, and has confused the meaning of an otherwise clear law.

Alternatively, Ms. Tapia would ask that her case be held in abeyance until this Court issues a decision in *Pepper v. United States*, Case No. 09-6822. That case presents the follow question: "Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. § 3553(a) after *Gall v. United States*?" Given the question presented, any decision in that case will discuss the sentencing goal of rehabilitation. Thus, there will likely be overlap in the Court's discussion and the issue this case raises. Ms. Tapia would therefore ask that this Court grant cert. in this case after issuing a decision in *Pepper* and remand to the Ninth Circuit, so that it can determine what effect *Pepper* has on Ms. Tapia's argument.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: July 28, 2010

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APPENDIX A

FILED

APR 16 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ALEJANDRA TAPIA, Defendant - Appellant.	No. 09-50248 D.C. No. 3:08-CR-00249-BTM MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Submitted April 5, 2010**

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

Alejandra Tapia appeals from the 51-month sentence imposed following her jury-trial conviction for bringing in an illegal alien for financial gain, in violation of 8 U.S.C. § 1324(a)(2)(B)(ii), bringing in an illegal alien without presentation, in

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violation of 8 U.S.C. § 1324(a)(2)(B)(iii), aiding and abetting, in violation of 18 U.S.C. § 2, and bail jumping, in violation of 18 U.S.C. § 3146. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Tapia contends that the district court committed plain error by basing her 51-month sentence on speculation about whether and when Tapia could enter and complete the Bureau of Prison's 500-hour drug abuse treatment program. No reversible error was committed. *See United States v. Duran*, 37 F.3d 557, 561 (9th Cir. 1994); *see also United States v. Waknine*, 543 F. 3d 546, 554 (9th Cir. 2008).

AFFIRMED.

OPPOSITION BRIEF

No. 10-5400

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ALEJANDRA TAPIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 3582(a) precludes a district court at an initial sentencing from considering a defendant's rehabilitative needs in setting the length of a term of imprisonment.

IN THE SUPREME COURT OF THE UNITED STATES

No. 10-5400

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v.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 376 Fed. Appx. 707.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2010. The petition for a writ of certiorari was filed on July 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of bringing in an illegal alien for financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii) and 2; one count of bringing in an illegal alien without presentation, in violation of 8 U.S.C. 1324(a)(2)(B)(iii) and 2; and one count of jumping bail, in violation of 18 U.S.C. 3146. Pet. App. A1-A2. The district court sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Id. at A2; Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. A1-A2.

1. In January 2008, petitioner and an accomplice drove from Mexico to the port of entry at San Ysidro, California in a jeep re-engineered to operate on an alternate fuel source. Gov't C.A. Br. 4. A border official discovered two illegal aliens concealed in the car's gas tank compartment. Ibid.; Pet. 3.

Petitioner and her accomplice were indicted in the United States District Court for the Southern District of California on one count of bringing in an illegal alien for financial gain and aiding and abetting, in violation of 8 U.S.C. 1324(a)(2)(B)(ii) and 2 (Count 1); and one count of bringing in an illegal alien without presentation and aiding and abetting, in violation of 8 U.S.C. 1324(a)(2)(B)(iii) and 2 (Count 2). Gov't C.A. Br. 4; Pet. 3. While petitioner was released on bond pending further proceedings,

she fled, and a bench warrant was issued for her arrest. Ibid. Petitioner was apprehended six months later, in possession of methamphetamine, a sawed-off shotgun, and mail belonging to other persons (which was to be used for committing identity theft). Gov't C.A. Br. 4. The government filed a superseding indictment against petitioner that added a charge of jumping bail, in violation of 18 U.S.C. 3146 (Count 3). Gov't C.A. Br. 4; Pet. 3. A jury found petitioner guilty on all three counts. Pet. App. A1-A2.

2. Petitioner faced a three-year mandatory-minimum sentence on Count 1, see 8 U.S.C. 1324(a)(2)(B)(ii), and her Sentencing Guidelines range was 41-51 months, Sent. Tr. 18. The district court sentenced petitioner to 51 months of imprisonment -- concurrent 46-month terms of imprisonment on Counts 1 and 2, and a consecutive five-month term of imprisonment on Count 3 -- plus three years of supervised release. Id. at 20-21.

The district court justified the sentence under the general sentencing criteria of 18 U.S.C. 3553(a). See, e.g., Sent. Tr. 20. The district court acknowledged, as a mitigating factor, that petitioner had a history of sexual and physical abuse. Id. at 16-17. But it observed that she had failed to get help when it was available; that she had smuggled aliens in a manner that created a substantial risk of death or serious injury; that she had jumped bail; that she had gotten involved with even more serious criminal

conduct while she was a fugitive; and that she had a prior felony conviction for possessing with intent to sell 66 pounds of marijuana. Id. at 16-18. The district court said that it was imposing the sentence to "deter [petitioner] from committing other criminal offenses," to "deter criminal conduct by others," and to "protect the public from further crimes." Id. at 18. The district court also stated that "one of the factors" affecting the length of imprisonment was that the sentence be "sufficient to provide needed correctional treatment" -- namely, that petitioner be imprisoned "long enough to get the 500 Hour Drug Program" administered by the Bureau of Prisons. Id. at 18-19.

The district court asked petitioner whether she had any objections to the sentence. Sent. Tr. 23. She had none. Id. at 23-24.

3. The court of appeals affirmed the sentence in an unpublished memorandum opinion. Pet. App. A1-A2. On appeal, petitioner argued that "the district court committed plain error by basing her 51-month sentence on speculation about whether and when [she] could enter and complete the Bureau of Prison's 500-hour drug abuse treatment program." Id. at A2. Citing circuit precedent that had construed 18 U.S.C. 3582(a) to permit a sentencing court to consider a defendant's rehabilitative needs in determining the length of a term of imprisonment, the court of appeals found "[n]o

reversible error." Pet. App. A2 (citing, inter alia, United States v. Duran, 37 F.3d 557 (9th Cir. 1994)).

ARGUMENT

Petitioner contends (Pet. 6-11) that 18 U.S.C. 3582(a) precludes a district court at initial sentencing from considering rehabilitative goals in determining the length of a term of imprisonment. Although the government agrees with petitioner's interpretation of the statute, further review of this case is unwarranted. Petitioner failed to preserve her claim in the district court and cannot prevail under a plain-error standard of review. Furthermore, because the government is in the process of informing the Ninth Circuit and other courts of appeals of the government's interpretation of Section 3582(a), the conflict among the circuits on that issue may well resolve on its own.

1. Section 3582(a) directs that a sentencing court "in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." Because the provision's final clause -- which requires a court to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation" -- applies both "in determining whether to impose a term of

imprisonment" and "in determining the length of the term," the plain language of the statute prohibits considering a defendant's rehabilitative needs as a factor in setting the duration of her prison sentence. See In re Sealed Case, 573 F.3d 844, 849 (D.C. Cir. 2009).

Rehabilitative needs may instead be considered only in imposing other, non-imprisonment, components of a defendant's sentence, such as supervised release, fines, and restitution.[1] The general sentence-determination provision, 18 U.S.C. 3553(a), includes "the need * * * to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" among the "[f]actors to be considered in imposing a sentence." 18 U.S.C. 3553(a)(2)(D). Sections 3553(a) and 3582(a) accordingly function in tandem to provide that "courts must consider a defendant's need for rehabilitation when devising an appropriate sentence (pursuant to § 3553(a)(2)(D)), but may not carry out that goal by imprisonment (pursuant to § 3582(a))." United States v. Manzella,

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[1] Rehabilitative needs may also be considered in revoking a previously imposed term of supervised release, because a court in such a proceeding is not imposing "a term of imprisonment" (18 U.S.C. 3582(a)), but merely requiring a defendant to "serve in prison all or part of the term of supervised release" (18 U.S.C. 3583(e)(3) (emphasis added)). See United States v. Tsosie, 376 F.3d 1210, 1213-1217 (10th Cir. 2004), cert. denied, 543 U.S. 1155 (2005); see also United States v. Doe, No. 09-2615, 2010 WL 3211128 at *5 (3d Cir. Aug. 16, 2010) (noting agreement among the circuits on this issue).

475 F.3d 152, 158 (3d Cir. 2007); see id. at 157 ("Sections 3553(a)(2)(D) and 3582(a) were enacted as part of the Sentencing Reform Act of 1984. * * * It is widely recognized that this legislation rejected rehabilitation as the primary goal of our criminal justice system, though it did not abandon it entirely.") (citing, inter alia, Mistretta v. United States, 488 U.S. 361, 366-367 (1989)); see also In re Sealed Case, 573 F.3d at 851.

2. As petitioner observes (Pet. 7-10), there is a conflict among the circuits regarding whether Section 3582(a) precludes a district court at an initial sentencing from considering rehabilitative needs in determining the length of a term of imprisonment. The Third and D.C. Circuits have held that it does. See Manzella, 475 F.3d at 156-161; In re Sealed Case, 573 F.3d at 848-851; see also United States v. Anderson, 15 F.3d 278, 280-281 (2d Cir. 1994) (stating this rule in a case that did not involve an initial sentencing). The Sixth, Eighth, and Ninth Circuits have held that Section 3582(a) merely precludes a court from considering rehabilitative needs in deciding whether to impose a term of

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Contrary to petitioner's suggestion (Pet. 7), neither United States v. Harris, 990 F.2d 594 (11th Cir. 1993), nor United States v. Maier, 975 F.2d 944 (2d Cir. 1992), interprets Section 3582(a). Instead, these decisions -- which were issued during the period when the courts of appeals deemed the Sentencing Guidelines to be mandatory -- address a similar, but distinct, statutory provision directing the Sentencing Commission to ensure that the Sentencing Guidelines "reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." 28 U.S.C. 994(k); see Harris, 990 F.2d at 596-597; Maier, 975 F.2d at 946-947.

imprisonment in the first instance, but does not preclude considering them in determining the length of such a term. See United States v. Duran, 37 F.3d 557, 561 (9th Cir. 1994); United States v. Hawk Wing, 433 F.3d 622, 629-30 (8th Cir. 2006); United States v. Jimenez, 605 F.3d 415, 424 (6th Cir. 2010); see also United States v. Giddings, 37 F.3d 1091, 1094 (5th Cir. 1994) (stating this rule in a case that did not involve an initial sentencing).

Any review of this circuit conflict would be premature, because the courts of appeals may resolve it on their own. Though the government has on some previous occasions defended an interpretation of Section 3582(a) that would allow district courts to consider rehabilitative needs in determining the length of a term of imprisonment at an initial sentencing, it is in the process of informing the courts of appeals that, upon further consideration, it no longer will do so. In a case currently pending before the Ninth Circuit, for example, the defendant has requested initial en banc rehearing on this issue, and the court has called for a response; the government has informed the court of appeals that it will support the defendant's interpretation of the statute if en banc consideration is granted. See Gov't Br. 20-26, United States v. Tagatac, No. 10-10074. The government will take similar positions in other appropriate cases in the Ninth Circuit and other courts of appeals. If the circuits are allowed time to

reconsider their precedent in light of the government's position, they may well reach agreement without the need for this Court's intervention.

3. Even if the question presented warranted review at this time, this case is not a suitable vehicle for deciding that question. Because petitioner failed to object to the district court's consideration of her rehabilitative needs in determining her sentence, her claim is subject to plain-error review. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731 (1993). To prevail on plain-error review, petitioner would have to show (1) an "error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." United States v. Marcus, 130 S. Ct. 2159, 2164 (2010) (citation omitted). The conflict among the circuits on the question presented, particularly in combination with Ninth Circuit precedent resolving the question adversely to petitioner, prevents the district court's error from being considered "obvious."[1] See Olano, 507 U.S. at 734 ("At a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear

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[1] The D.C. Circuit has found plain error in a district court's consideration of rehabilitative needs in setting the length of a term of imprisonment. See In Re Sealed Case, 573 F.3d at 851-852. Unlike in this case, however, there was not controlling circuit precedent on the issue at the time.

under current law."). It is also unlikely that petitioner could demonstrate that the error "affected her substantial rights," in light of the other factors that the district court relied upon to justify the within-Guidelines sentence of 51 months.

4. Finally, petitioner's suggestion (Pet. 11) that this case be held for Pepper v. United States, cert. granted, No. 09-6822 (oral argument scheduled for Dec. 6, 2010), lacks merit. Pepper presents two questions: first, whether a district court resentencing a defendant following a successful government appeal must apply the same percentage departure from the Guidelines range for substantial assistance as was applied in the initial sentencing; and second, whether a district court at such a resentencing may consider the defendant's post-sentencing rehabilitation in deciding whether to vary downward from the advisory Guidelines range. Gov't Br. i, Pepper, supra. Neither issue is presented in this case. This was an initial sentencing, not a resentencing. And the issue here was not, as in Pepper, whether a defendant's actual past rehabilitation could be a factor in reducing a prison term (because, for example, the defendant no longer presents as much danger to the community), but instead whether the possibility of future rehabilitation could be a factor in lengthening a prison term. However the Court resolves the issue in Pepper concerning consideration of post-sentencing

rehabilitation at resentencing, the decision in Pepper will have no bearing on petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2010

REPLY BRIEF

No. 10-5400

In The

Supreme Court of the United States

ALEJANDRA TAPIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) . . . , recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.[1]

The import of these words and the common understanding of their meaning are clear: Whether imposing or determining the length of prison sentences, judges must accept that imprisonment may not be used to further rehabilitation.

Amicus makes the counter-intuitive argument that this language *invites* courts to impose sentences of imprisonment to promote rehabilitation – so long as the sentencing court hopes that, in the future, the Bureau of Prisons ("BOP") will place the inmate in a "targeted treatment program" – something neither the Sentencing Reform Act ("Act") nor §3582(a) mentions. Amicus' "targeted treatment" interpretation is not so much statutory construction as statutory invention. In truth, the statute's plain meaning and structure forbid, rather than encourage, imprisonment to provide offenders with treatment. Judges sentence offenders to prison, not prison-based programs. The Act empowers judges to mandate treatment as a

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[1] 18 U.S.C. §3582(a).

condition of probation or supervised release. But it entrusts solely to the BOP the decision to allow an inmate to participate in prison-based rehabilitation programs.

Legislative history confirms this understanding of the Act's plain language. That history evinces Congress' hostility to the rehabilitative model and the practice of "coercive rehabilitation" in which prison sentences were tied to the successful completion of treatment and rehabilitation programs. Perhaps more telling, as legislation that became the Act moved through successive iterations and Congresses, it changed from permitting rehabilitative imprisonment in exceptional circumstances, to barring it "generally," to banning it categorically.[2]

The plain language, structure, and legislative history of the Act confirm that it does not allow judges to impose or increase prison sentences to provide offenders the chance to participate in rehabilitative programs.

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[2] *See* S. 1722, 96th Cong., 2nd Sess. §2302 (as reported Jan. 17, 1980) (striking the word "generally" from the bill's instruction that courts must "recognizle] that imprisonment is not *generally* an appropriate means of promoting correction and rehabilitation") (emphasis added) (copy attached in Appendix at App. 2).

I. The Act's Plain Language Bars Imprisonment-For-Treatment.

A. The Statute Includes No Exception for "Targeted Treatment."

Amicus' principal argument is that the words "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" mean not what they say but rather "remind judges of the failure of the rehabilitative ideal" and instruct them "not [to] confuse 'grand inanities about universal redemption' with the statute's more specific and practical approach to treatment." Brief of Amicus Curiae ("AC") 11, 23. Amicus argues that the statute embraces "targeted treatment programs." *Id.* 23.

Amicus is not interpreting statutory language: The phrases "targeted treatment program" and "rehabilitative ideal" appear nowhere in the Act. The statute contains no discussion of the history of penology in America or its failures. It contains no discussion of treatment options, targeted or otherwise. As to imprisonment, the statute's commands are simple: Consider the purposes of retribution, deterrence, incapacitation, and rehabilitation; do not imprison for the sake of rehabilitation. Amicus' argument would create a very different statute, one that requires judges to "recollect" the history of the rehabilitative model and the debate over its efficacy and parse, without congressional guidance, the differences between "correction and rehabilitation" on the one hand and "targeted treatment" on the other. AC:24-25. Amicus argues, in effect, that Congress has

directed sentencing courts to bear in mind the failures of the rehabilitative model while simultaneously licensing courts to repeat those mistakes. That "targeted treatment programs" and the "rehabilitative ideal" are never mentioned in the Act, let alone identified as mandatory considerations for custody decisions, shows that Amicus' proposed reading of the statute does not interpret its words but re-writes them.

Amicus argues that imprisonment to make available a program does not contravene the statute's plain language because: "When a judge lengthens a sentence to allow participation in a targeted treatment program, it is the treatment program, not 'the act of confining a person' . . . that is the means of promoting rehabilitation." AC:22. But the statute does not require that judges recognize "imprisonment does not rehabilitate." It requires they recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. §3582(a). "Promote" does not mean "effect." It means "advance the interests of" or "further the growth, development, progress, or establishment of." *Oxford English Dictionary* promote (def.1 & 12a) (3d ed.), http://www.oed.com (last visited Apr. 5, 2011) ("OED"). A judge imposing imprisonment to make accessible a rehabilitative treatment program is using imprisonment to "advance the interests of" or "further the growth, development, progress or establishment of" rehabilitation. Amicus' proposal falls squarely within §3582(a)'s express proscription.

B. "Recognizing" Means "Accepting As True."

Amicus' argument turns on ascribing to the word *recognizing* in §3582(a) a meaning inconsistent with the grammatical structure of the sentence Congress wrote. Amicus contends that "recognizing" does not mean "acknowledge the existence or truth of" and "admit the fact, truth, or validity of" as Petitioner and the Government argue, Petitioner's Brief ("PB") 26 n.18; Solicitor General's Brief ("SB") 18. Amicus posits that "recognizing" means "'[t]o know again,' 'recollect,' or 'recall to mind.'" AC:23-24 (citing the *OED*, *Webster's Third International Dictionary*, and *Random House Dictionary of the English Language*, as well as two Latin dictionaries). Noting the word's origins in the Latin *recognōscere*, meaning "know again," "recall," and "recollect," Amicus asserts this is the intended meaning in §3582(a). However, the grammatical context of §3582(a) makes clear the meaning Congress intended – and that Amicus is wrong.

"Recognize" as defined by Amicus is a transitive verb. It takes a noun object, i.e., *recognize a face*. "Recognize" as defined by Petitioner may take a direct-object complement or may be followed by a subordinate *that*-clause, i.e., *recognize that Barack Obama is president*. *See OED* recognize (def.3c) (3d ed.), http://www.oed.com (last visited Apr. 5, 2011). When recognize means "recall to mind," it cannot take a *that*-clause as its complement. Thus, "I recognize this place" can mean "I recall this place." But, "I recognize that this place is my home" means "I realize (or understand, apprehend, or accept) that this place

is my home." Because *recognize* in §3582(a) occurs in collocution with a *that*-clause ("recognizing that imprisonment is not . . . "), it cannot mean what Amicus asserts.[3]

As noted, Amicus argues his preferred sense of the word "recognize" from its Latin origin, but this view is anachronistic and oversimplified. Original senses of borrowed words are often a poor indication of current meanings. The modern English word *salary* derives from the Latin word for a soldier's allowance for his salt-ration, but that fact hardly elucidates its contemporary meaning. The verb *recognize* was not borrowed directly from Latin; it came into the language via Norman French legal usage after the Conquest, first appearing in Scottish legal texts with a specialized meaning. *See OED* recognize (3d ed.), http://www.oed.com (last visited Apr. 5, 2011).[4] One cannot simply consult a Latin

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[3] *See also* Thomas Herbst, et al., *A Valency Dictionary of English* 658-59 (2004) (listing a *that*-complement structure only for the "acknowledge" sense of *recognize*, not the "identify" sense). Note also that the second edition of the *OED* specifically states that the meaning "treat as valid, as having existence or as entitled to consideration" appears in absolute constructions, as Petitioner proposes for §3582(a). *OED* recognize (def.4a) (2d ed. 1989), http://www.oed.com/oed2/00199328 (last visited Apr. 5, 2011); *see* PB:17-18.

[4] The sense proffered by Petitioner and the Government first appeared in the 16th century, about 50 years before the first occurrence of the sense asserted by Amicus. *See id.* (def.2a, 3a & 5a). Amicus' claim that "[j]udges must *recognize* – 'recall to mind' . . ." AC:24, seems to confuse this verb with the separate verb *re-cognize* (so spelled and with different pronunciation)

(Continued on following page)

dictionary and apply the definitions found there to another language's words two thousand years later.

Amicus also argues that his proposed meaning of "recognize" is proper because certain English dictionaries list "recall" as the word's first definition while listing Petitioner's and the Government's proffered meaning, "acknowledge the existence or truth of" and "admit the fact, truth, or validity of," as secondary. AC:23-24 & nn.4, 5; *cf.* PB:26 n.18; SB:18. Determining what, in §3582(a), *recognizing* means is not a matter of checking which definition dictionary editors place first under its listing. The order of entries may reflect the most common use, but also some other criterion, such as historical sequence or usage factors (standard before dialect, formal before colloquial, active before obsolete, etc.).[5] Even dictionaries from the same source, produced during the same time frame, may differ in the order of entries. Amicus notes that *Webster's Third* (published in 1971) lists "recall" as the first non-obsolete meaning of *recognize*,

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meaning "to cognize again." *See id.* re-cognize. Such uses of the verb *recognize* are noted to be obsolete and rare. *See id.* recognize (def.6a, b).

[5] Amicus cites *Webster's Third*'s designation of the "admit the fact, truth, or validity of" sense as obsolete. AC:24 n.5. That dictionary gives no dated attestations to support its classification. The current edition of the *OED*, on the other hand, lists this sense as the first, non-obsolete definition and gives a 1998 quotation. *OED*, recognize (def.2b), http://www.oed.com (last visited Apr. 5, 2011).

but it is the third meaning listed in *Webster's 9th New Collegiate Dictionary* 984 (1984) and *Merriam-Webster's Collegiate Dictionary* 1039 (11th ed. 2007). The "recall" sense is listed as the second non-obsolete meaning in 2 *New Shorter Oxford English Dictionary* 2503 (1993) and the second edition of the *Oxford English Dictionary* (1989), but it is listed seventh in the current, third edition. The sequence of entries is not particularly telling.

C. Section 3582's Language Is Mandatory.

Alternatively, Amicus argues that even if Congress meant what it said, that "imprisonment is not an appropriate means of promoting correction and rehabilitation," the *recognizing*-clause is merely hortatory. It only discourages sole reliance on rehabilitative concerns to justify imprisonment. AC:43-51. As Petitioner has noted, PB:26-27, no court – not even those which hold that §3582(a) allows lengthening imprisonment for rehabilitation – has questioned the mandatory force of the "recognizing" language. *United States v. Duran*, the fountainhead of such caselaw, describes §3582(a) as a "prohibition," 37 F.3d 557, 561 (9th Cir. 1994), not as a mere "warn[ing] . . . against the lure of the rehabilitative ideal's siren song." AC:43.

Amicus contends that the Act's use elsewhere of clearly mandatory language like "shall" and "assure" shows the word "recognizing" in §3582(a) to be merely precatory. AC:44-46. But, properly understood,

"recognizing" communicates categorical disapproval of prison-for-rehabilitation: "accept the authority, validity, or legitimacy of; *esp.* to accept the claim or title of (a person or group of people) to be valid or true." *OED* recognize (def.2b) (3d ed.), http://www.oed.com (last visited Apr. 5, 2011); likewise, "acknowledge the existence or truth of," *id.* (def.3a), and "perceive clearly; to realize, understand, or apprehend *that*." *Id.* (def.3c). It would be a contorted reading of this sentence to require judges accept as true that imprisonment-for-rehabilitation is inappropriate while simultaneously allowing them to impose or lengthen custody for that purpose. PB:26-27. Thus, context confirms the meaning urged by Petitioner and the Government as the one Congress intended. *See generally Deal v. United States*, 508 U.S. 129, 131-32 (1993).

Moreover, the mandatory nature of the prohibition inheres in the structure of the sentence Congress wrote. Petitioner's plain-meaning analysis of §3582 demonstrates that the phrase, "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation," must be either an absolute phrase modifying the entire sentence or a participial modifier of the main clause's subject, "the court." PB:15-18. That main clause utilizes the verb *shall*, whose use indicates Congress' intent to "impose discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001). The mandatory sense of the modal verb *shall* extends throughout the entire sentence,

including the "recognizing" proviso, in accord with the usual rules of grammar.[6]

II. The Act's Structure and Context Confirm That It Bans Imprisonment-For-Rehabilitation.

A. Judges Sentence Offenders to Prison, Not Treatment Programs.

While Amicus proposes that it invites judges to impose or increase terms of imprisonment to make treatment available, the Act gives courts no authority to require the BOP to provide such treatment or mandate that offenders participate if treatment is made available. A Congress that intended judges to imprison offenders in order to put them in treatment would not have stripped those same judges of the power to accomplish this.

Courts may sentence an offender to a term of probation, a fine, or a term of imprisonment. 18 U.S.C. §3551(b). When imposing probation or supervised release, a judge – employing any of numerous standard and special conditions – has broad authority to tailor the sentence to the specific needs and characteristics of the defendant. *See* 18 U.S.C. §§3563(b) & 3583(d). Conversely, "sentencing judges have no authority to order the Bureau of Prisons to place a defendant in any given rehabilitative program that

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[6] *See* F.R. Palmer, *Mood and Modality* 2 (1986) (noting that modality is not just a verbal category but a grammatical characteristic of the entire sentence).

might be offered, though they may offer recommendations." *United States v. Manzella*, 475 F.3d 152, 158 (3d Cir. 2007). This allocation of power shows that Congress intended courts to address rehabilitative concerns through probation and supervised release, not prison.

B. Amicus' Interpretation Conflicts with Congress' Directive to the Sentencing Commission.

The Act requires the Sentencing Commission ("Commission") to "insure [sic] that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional *treatment*." 28 U.S.C. §994(k) (emphasis added). Section 3582 should be read consistently with §994(k). Allowing judges to impose prison-for-treatment cannot be reconciled with requiring them to abide by mandatory guidelines that bar rehabilitative imprisonment. Amicus' reading of §3582(a) as permitting imprisonment for correctional treatment cannot be squared with the categorical language of §994(k).

C. Amicus' Exception to §3582 Swallows the Rule.

Moreover, allowing judges to consider rehabilitation when a defendant may benefit from a "targeted

treatment program" creates an exception that swallows the rule. By exhibiting drug dependence or abuse, nearly half of all federal prisoners might qualify for treatment. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Drug Use and Dependence, State and Federal Prisoners, 2004* tbl. 5 (Oct. 2006) (45.5% of federal prisoners exhibit drug dependence/abuse). The portion of prisoners who reported using drugs "regularly" is even higher. *See id.* tbl. 2 (64.3% reported using drugs at least once a week for at least a month). Even without adding in alcohol abusers, at least one-half to two-thirds of custodial sentencing decisions involve defendants who might benefit from drug treatment alone. The exception Amicus reads into the overtly categorical ban in §3582(a) thus extends to the majority of the prison-eligible defendants in federal courts.

D. Statutory Context and Structure Support Petitioner's Interpretation.

Amicus claims that Petitioner's reading of "the subordinate 'recognizing' clause . . . undercut[s] the main clause by forbidding a judge to lengthen a prison sentence to facilitate a defendant's entry into a treatment program." AC:22 (also stating that Petitioner's analysis puts the clauses "at war with each other"). It does not. As Petitioner reads the statute, a need for rehabilitation must be considered when deciding whether to imprison, and for how long; but this need will counsel only against incarceration or in favor of a shorter term, not the converse. Rehabilitation

is considered, but it points only one way. The same is true for other considerations. A need for incapacitation will point only toward imposing or increasing imprisonment. That §3582(a) constrains a judge's consideration of rehabilitation is not surprising. The entire Act directs and constrains a judge's previously unlimited sentencing discretion.

Beyond this, it is common that legislation contains general, guiding principles limited by later provisos. *See, e.g.*, 18 U.S.C. §3553(a)(4)(A)(ii); (a)(5)(B); (b)(1); (c)(2) (all including exceptions/conditions on more general procedures). Indeed, the same sentence in §3582(a) limits its directive to consider the factors set forth in §3553(a) by requiring that courts both 1) recognize prison does not promote rehabilitation and 2) apply the §3553(a) factors "only to the extent they are applicable." 18 U.S.C. §3582(a). Such provisos condition and tailor general principles; it is inaccurate to describe them as "undercutting" the broader rule. This pattern of legislative drafting is so common that it gives rise to a familiar canon of statutory construction: "a more specific statute will be given precedence over a more general one. . . ." *Corley v. United States*, 129 S. Ct. 1558, 1568 (2009) (quotation omitted).

There is no incongruity that requires the two parts of the sentence to be "harmonize[d]." AC:23. The conflict is imaginary, arising out of Amicus' assertion that Congress wanted to exempt "targeted treatment programs" from its ban on rehabilitative imprisonment. On the other hand, directing sentencing judges to acknowledge that incarceration does not rehabilitate

while allowing them to impose or lengthen imprisonment to further rehabilitation is not merely disharmonious, it is outright contradictory. PB:26-27. It is difficult to conceive that Congress could have expected judges to embrace such a contradiction without, at least, identifying this exception for "targeted treatment" and explaining how it differs from the treatment modes rejected with passage of the Act.

Amicus also argues that any limitation on using *imprisonment* to rehabilitate would be inconsistent with legislative intent because, in 18 U.S.C. §3553(a)(2)(D), Congress cited rehabilitative needs as a factor in determining a defendant's overall *sentence*. *See* AC:26-32. Amicus confuses "sentence" with "imprisonment" and misunderstands "consider." Federal judges have multiple sentencing options: fines, probation, imprisonment, supervised release, restitution, and forfeiture. Judges must consider rehabilitation in relation to each of the statutory sentencing options: probation, fines, and imprisonment. In considering imprisonment, the need for rehabilitation will militate only in favor of no or less imprisonment. That this factor points always away from incarceration does not mean it is not considered. Thus, there is no disharmony between the mandatory sentencing factors in §3553(a) and §3582's limitation on the manner in which rehabilitation may be considered. AC:26.

By confounding these various sentencing options, Amicus ignores the very real differences between custodial and non-custodial sentences, treating prison

as if it were just the incidental venue for a treatment program. *See* AC:22 ("When a judge lengthens a sentence to allow participation in a targeted treatment program, it is the treatment program, not 'the act of confining a person' . . . that is the means of promoting rehabilitation."). It is a nice semantic distinction, but it misunderstands the Act, which allows judges to sentence defendants only to *prison*, not to *prison programs*. *See* AC:28 (stating the district court here "chose" an in-prison treatment program for Petitioner). That is why, despite the trial court's wishes, Petitioner sits in prison, without access to the recommended program. PB:42-45; SB:29-30.

Amicus claims that a rehabilitation ban in §3582(a) undermines the incapacitation goal in §3553(a)(2)(C), stating that it would force judges who doubt eventual rehabilitation to "lengthen their sentences to protect the public." AC:29. The logic of Amicus' imaginary judge would need be: "Prison rehabilitates; at the end of X term, the offender will be rehabilitated, and incapacitation will be unnecessary." Such reasoning is premised on a rejection of the principle Congress required judges to accept, that imprisonment is not an appropriate means of rehabilitating offenders. A sentencing judge who acts as Amicus describes defies the will of Congress.

Moreover, Amicus' reasoning would only invite speculative trade-offs between rehabilitation and incapacitation in setting prison terms to qualify for programs – programs that may never be available to the defendant. That adds up to more uncertainty,

unwarranted disparity, and arbitrariness, not less. As Amicus observes, the intent of the Act was to reduce these. AC:26.

Amicus also argues that Petitioner's approach deprives judges of the flexibility the Act intended, AC:30-31, 53, prevents judges and the Commission from adjusting to evolving knowledge, AC:31, and creates potential unfairness. AC:31-32. The breadth and detail of conditions Congress made available to a judge designing a non-custodial sentence address flexibility concerns far better than the imprison-and-hope-she-gets-the-program method Amicus extols. Because neither a district judge nor the Sentencing Commission controls availability of programs in federal prisons, a prison-rehabilitation ban does not prohibit either from acting on new knowledge, consistent with limits set by Congress.[7] Finally, as regards certainty and fairness, AC:31-32, this case shows that the only certainty in imposing extra prison time to qualify Petitioner for treatment is that she will indeed serve that extra time, despite not being enrolled in the program. It is difficult to see the fairness in that.

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[7] It may be that new knowledge will lead in the future to a reversion to the former indeterminate-sentencing model, *see* Bill Von Sternberg, *Bill Seeks to Keep Sex Offenders Jailed*, Minneapolis Star Tribune, http://www.startribune.com/politics/statelocal/118054904.html (Mar. 15, 2011) (reporting state effort to move to indeterminate criminal sentences for certain sex offenders), but certainly a judge cannot defy the present scheme of determinate sentencing, even if convinced it is a failure.

III. Legislative History.

A. The Rehabilitative Model of Isolation, Silence, Routine, and Work Died in the Nineteenth Century. The Targeted Treatment Regime Amicus Proposes Is the Model That Congress Rejected.

Amicus posits that, in requiring judges to "recognize imprisonment is not an appropriate means of promoting rehabilitation," Congress insisted only that courts acknowledge the failure of the "rehabilitative ideal," the "amorphous hope of reforming every convicted criminal's soul through isolation and prison routine." AC:11. In making this argument, Amicus relies on his understanding of the history of the penitentiary and his belief that the rehabilitative ideal rejected by Congress was that "amorphous hope." History shows that this "amorphous hope" had died a century before Congress took up sentencing reform and that it was an approach identical to Amicus' "targeted treatment" regime against which Congress legislated.

The rehabilitative ideal Amicus describes, an ideal which relied on isolation, silence, routine, and work to reform the prisoner's soul, was abandoned a century ago. *See generally* David J. Rothman, *Perfecting the Prison, United States, 1789-1865, in The Oxford History of the Prison* 100, 112-14 (Norval Morris & David J. Rothman, eds., 1998); Lawrence M. Friedman, *Crime and Punishment in American History* 82, 156-59 (1993).

Through successive waves of prison reform, the rehabilitative model evolved from its original understanding. Edgardo Rotman, *The Failure of Reform, United States 1865-1965, in The Oxford History of the Prison* at 152-71; Friedman, 159-63. By the 1950s, the prevailing corrections philosophy was that rehabilitation could be achieved through "treating" the "sick" offender. Treatment programs multiplied. These included group therapy, individual therapy, educational remediation, vocational training, and narcotics addiction treatment. Rotman, 169-71; *see also* James Robison and Gerald Smith, *The Effectiveness of Correctional Programs*, 17 Crime and Delinquency 67, 68 (1971); Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, 35 Public Interest 22, 29-33 (1974). The model of the postwar era was one of coercive rehabilitation: Prisoners were reformed, not by silence, isolation, routine, and work, but by participation in treatment programs. S. Rep. No. 98-225, at 40 (1983), *as reprinted in* 1984 U.S.C.A.A.N. 3182 ("Senate Report"). It was this model of reform through prison-based rehabilitation programs that Congress rejected with the Act. Amicus' reading turns this history, and the Act, on its head.

Congress rejected a system of prison-based treatment because it doubted its worth and suspected that it was used as a rationale to imprison disproportionately the poor and minorities. By the 1960s, a backlash against the prevailing correctional treatment model was born. From the mid-1960s through 1975, as the homicide rate more than doubled from

4.6 to 9.4 per 100,000, this backlash grew. James Alan Fox & Marianne W. Zawitz, Bureau of Justice Statistics, U.S. Dep't of Justice, *Homicide Trends in the United States: 2002 Update* 1 (2004). Increasingly, academic criticism of these prison-based programs questioned their efficacy. *See* Senate Report 40 n.16. In 1974, researchers employing meta-analysis assessed all evaluations of criminal rehabilitation programs between 1945 and 1967, concluding: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." D. Lipton, et al., *Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975). By the late 1970s, the *cri de coeur* of the system's academic critics was "nothing works." Martinson, 40. Another set of critics complained that the poor and minorities were unnecessarily incarcerated with the hope that prison-based treatment programs would aid their reformation. *See* Senate Report 171 & n.408.

These critics' views drove Congress' rejection of the rehabilitative model. It is their criticisms Congress cites in abandoning this model: "[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." *Id.* 38; *see also id.* 40 & n.16. The system Congress rejected is this system in which imprisonment is designed to rehabilitate and freedom is

obtained through successful completion of prison-based treatment programs. *Id.* 40.

Congress' rejection of this model is emphasized by the repeal of its prior mandate for prison-based treatment. During the 1960s and '70s, the federal government's most prominent treatment program was drug treatment, made widely available through the Narcotics Addict Rehabilitation Act of 1966 ("NARA"). *See* 18 U.S.C. §§4251 *et seq.* This statute required a court finding an "eligible offender" to be an addict and "likely to be rehabilitated through treatment" to sentence that offender to the custody of the Attorney General for treatment. Senate Report 118-19. The Act repealed NARA. *See* Pub. L. No. 98-473, tit. II, §218(a)(6), 98 Stat. 1837, 2027 (1984). Congress' repeal of NARA cannot be reconciled with a view that it intended to allow judges to incarcerate people to make treatment available (if BOP grants it). Amicus has offered no meaningful distinction between the treatment programs Congress rejected and those which Amicus espouses. And appending the adjective "targeted" to these programs' descriptions does not provide it. Congress did the opposite of what Amicus proposes. It banned imprisonment-for-treatment and shifted mandatory participation in treatment programs and attention to rehabilitative concerns to non-incarceration sanctions, probation and supervised release. Only with regard to these sanctions did Congress give judges power to impose participation in treatment programs as a condition of freedom.

B. Congress Intended That Rehabilitative Needs Would Never Justify Imprisonment.

Amicus also argues that, even if an offender's need for treatment cannot *alone* justify imposing or increasing a term of imprisonment, in combination with other factors, it may. Amicus derives support for this argument from a misreading of legislative history. As discussed in Petitioner's opening brief, Congress intended that imprisonment would serve purposes of retribution, deterrence, or incapacitation, not rehabilitation, and where rehabilitation is a court's primary aim, it will choose an option other than incarceration. PB:53-57. But Congress did not intend that an offender who deserves imprisonment, whether for retribution, deterrence, or incapacitation, would necessarily avoid prison because he also needed rehabilitation. So Congress did not ban the use of incarceration whenever rehabilitation is a court's primary concern. If a need for retribution, deterrence, or incapacitation justifies imprisonment, Congress allowed a court to impose it, Senate Report 119, but the court may not impose or lengthen imprisonment to further rehabilitation. *Id.* 76, 119, 176. Misreading language which recognizes this principle, Amicus finds support for the idea that Congress believed incarceration for rehabilitative purposes could be appropriate.[5] *See, e.g.*, AC:49 ("Congress discouraged

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[5] Amicus also incorrectly argues that "Petitioner concedes that it 'may seem more natural' to read [28 U.S.C.] §994(k)'s legislative history as forbidding 'the imposition of imprisonment

(Continued on following page)

imprisonment 'on the *sole* ground' of correctional treatment, where rehabilitation is '*the* purpose of sentencing' or 'the *only* appropriate purpose of sentencing.'") (quoting Senate Report 91, 92, 119) (emphasis added by Amicus). Amicus misunderstands these words by viewing them in isolation, without reference to Congress' understanding that courts were authorized to impose imprisonment whenever a need for retribution, deterrence, or incapacitation justified it. In light of this principle, it would have been illogical for Congress to state without qualification that, if the primary purpose of sentencing is rehabilitation, the court must impose a non-prison sentence.

In her opening brief, Petitioner described how, in revising legislation that would become the Act, Congress eliminated provisions which would have allowed rehabilitative incarceration. Petitioner and the Government argue this demonstrates the legislature's intent to ban completely this practice. PB:57-59; SB:33-34. Amicus disagrees, arguing that Congress' intent in deleting this provision was merely to eliminate the option of indeterminate sentencing, not the

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only when rehabilitation is the "sole" purpose that incarceration would serve.'" AC:46. The language Amicus selectively quotes from Petitioner's brief discusses a single sentence in the Senate Report and concludes that it is ambiguous because, while a reading that this one sentence means Congress intended to bar imprisonment only when rehabilitation is its sole justification is natural, the whole of the Act's legislative history supports the opposite conclusion. PB:50 n.33.

use of imprisonment for rehabilitation. AC:37. Amicus is wrong, for, in Congress' view, the two were bound tightly together: S. 1437, 95th Cong., 1st Sess. (as reported by S. Comm. on the Judiciary, Nov. 15, 1977) would have allowed a partially indeterminate prison sentence *if* the judge found the defendant's participation in a specific type of rehabilitation program served a sentencing purpose and the *sole* way to make that program available was through imprisonment. S. Rep. No. 95-605, 95th Cong., 1st Sess. 883 (1977); *see also id.* 929. Indeterminate sentencing would not have been available except in this instance.

The Judiciary Committee report on S. 1437 confirms, first, that Congress understood a need for rehabilitation generally would not justify imposing or increasing a prison sentence to further rehabilitation, and, second, that it viewed this provision as the only portion of the bill under which a judge could do that:

> The Committee recognizes that the purpose of rehabilitation is not currently thought to be sufficient in most cases as the sole purpose of a sentence to a term of imprisonment or, where there are other reasons for imprisonment, such as deterrence or incapacitation, to be a fair basis for determining the length of a term of imprisonment. . . . The purpose of rehabilitation is still important in determining whether a sanction other than a term of imprisonment is appropriate in a particular case. The Committee in no way means to suggest that we should abandon our efforts to rehabilitate prisoners. On the

> contrary, the Committee views rehabilitation as a proper purpose of criminal sanctions other than imprisonment. In addition, there is limited authority for the Sentencing Commission to provide a partially indeterminate sentence to a term of imprisonment if the judge finds that a purpose of sentencing is served by the defendant's participation in a specific type of rehabilitation program and the sole way to make that program available to the defendant is through imprisonment.

Id. at 891-92. A need for rehabilitation or treatment might militate against incarceration, but it could not justify imposing or increasing imprisonment – except under this one limited exception to the general rule. When the 96th Congress did away with the exception, it banned both indeterminate sentencing and imprisonment for rehabilitation. *See* S. 1722, 96th Cong., 1st Sess. (1979).

Other actions of the 96th Congress confirm that it intended to ban absolutely imprisonment for rehabilitation. That Congress moved language directing courts to recognize the inappropriateness of imprisonment for rehabilitation from a section addressing general purposes of sentencing to one addressing specifically imprisonment. As introduced, that language was not absolute. It read:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length, shall consider the factors set forth in section 2003(a) to the extent that

> they are applicable, recognizing that imprisonment is *generally* not an appropriate means of promoting correction and rehabilitation.

S. 1722 §2302 (emphasis added).

When the Judiciary Committee reported S. 1722, it struck the word "generally." S. 1722, 96th Cong., 2nd Sess. (as reported Jan. 17, 1980). *See* App. 2. In doing so, Congress made the prohibition not "general" but absolute. This absolute ban was carried forward unchanged into S. 1762, 98th Cong., 1st Sess. (1983) and eventually into the Act. Together with deletion of the provision allowing a court to imprison an individual so that he might participate in a specific correctional program, this striking of the word "generally" makes clear that Congress intended to do away entirely with the use of imprisonment for rehabilitative purposes.

Amicus further argues that the legislative history supports its view because, in another bill, S. 1555, 97th Cong., 1st Sess. §102(a) (1981), Congress considered and rejected language banning rehabilitative incarceration in terms clearer than those in §3582. AC:38-39. As discussed elsewhere, the language of §3582 is clear in banning rehabilitative imprisonment. That Congress could have been more clear has no relevance in determining the meaning of a statute that is, on its face, clear. *See Manzella*, 475 F.3d at 160. But beyond this, Amicus is simply wrong in contending that Congress considered and rejected

S. 1555's ban on rehabilitative punishment. The bill was indeed introduced by Senator Kennedy. But the Congressional Record nowhere reflects that the bill was reported by the Judiciary Committee, let alone considered and rejected by the House or Senate. The failure of Congress to enact the language of S. 1555 is thus no evidence of its views.

Amicus also contends that Congress' creation and support of prison-based drug-treatment programs evinces its intention to allow courts to consider such programs in imposing or lengthening prison sentences. AC:39-43. The short answer to this is that Congress created these programs through the Violent Crime Control and Law Enforcement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4913 (1990) (codified as amended at 18 U.S.C. §3621(b)). That occurred some six years after passage of the Act. The actions of another Congress, years later, reveal nothing about the intent of the legislature in passing the Act. *See United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *see also United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring in part and concurring in judgment) ("[T]he will of a later Congress that a law enacted by an earlier Congress should bear a particular meaning is of no effect whatever. The Constitution puts Congress in the business of writing new laws, not interpreting old ones."); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative

history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote."). The Congress that passed the Act repealed NARA, 18 U.S.C. §§4251 *et seq.*, which required judges to incarcerate addicts for treatment. *See* Pub. L. No. 98-473, tit. II, §218(a)(6), 98 Stat. 1837, 2027 (1984). This is far more relevant evidence of Congress' view of the propriety of incarcerating offenders to allow their participation in prison-based treatment.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

Calendar No. 587

96TH CONGRESS
1ST SESSION **S. 1722**

[Report No. 96-553]

To codify, revise, and reform title 18 of the United States Code; and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 7 (legislative day, JUNE 21), 1979

Mr. KENNEDY (for himself, Mr. THURMOND, Mr. HATCH, Mr. DECONCINI, and Mr. SIMPSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JANUARY 17 (legislative day, JANUARY 3), 1980

Reported by Mr. KENNEDY, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

To codify, revise, and reform title 18 of the United States Code; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Code Reform Act of 1979".

* * *

"CHAPTER 23 - IMPRISONMENT

"Sec.

"2301. Sentence of Imprisonment.

"2302. Imposition of a Sentence of Imprisonment.

* * *

"§ 2302. Imposition of a Sentence of Imprisonment

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT. – The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 2003(a) to the extent that they are applicable, recognizing that imprisonment is ~~generally~~ not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

* * *

JOINT APPENDIX

JAN 3 1 2011
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No. 10-5400

In The Supreme Court of the United States

ALEJANDRA TAPIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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U.S. District Court
Southern District of California (San Diego)
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#: 3:08-cr-00249-BTM-2

01/30/2008	12	INDICTMENT as to Tinamarie Torres Debenedetto (1) count(s) 1, 2, Alejandra Tapia (2) count(s) 1, 2. (rmm) (Entered: 01/31/2008)
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4/28/2009	140	SENTENCING MEMORANDUM by Alejandra Tapia (Attachments: # 1 Exhibit, # 2 Proof of Service) (Betancourt, Michelle) Modified on 4/29/2009 – Atty e-mailed re timeliness (vet). (Entered: 04/28/2009)

5/01/2009	142	JUDGMENT as to Alejandra Tapia (2), Count(s) 1, 2, The underlying counts are dismissed on the motion of the United States.; Count(s) 1s, Custody of BOP for a term of 46 Months; Count(s) 2s, Custody of BOP for a term of 46 Months concurrent with count 1.; Count(s) 3s, Custody of BOP for a term of 5 Months consecutive to counts 1 and 2 for a total sentence of 51 Months. Supervised release 3 years concurrent as to all counts. Assessment $300.00 payable at a rate of $3.00 per month through the inmate financial responsibility program with the balance to be paid within 6 months of release. No fine. Signed by Judge Barry Ted Moskowitz. (vet) (Entered: 05/01/2009)
5/12/2009	143	NOTICE OF APPEAL by Alejandra Tapia re 142 Judgment. (Filing Fee: No Fee Required). (akr) (Entered: 05/12/2009)

General Docket
United States Court of Appeals
for the Ninth Circuit

Court of Appeals Docket #: 09-50248
Docketed: 05/18/2009
Termed: 04/16/2010
United States of America v. Alejandra Tapia
Appeal From: U.S. District Court for Southern California, San Diego
Fee Status: IFP

04/16/2010	17	FILED MEMORANDUM (PAMELA ANN RYMER, M. MARGARET MCKEOWN and RICHARD A. PAEZ) AFFIRMED. FILED AND ENTERED JUDGMENT. [7304231] (SJ)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

January 2007 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. TINAMARIE TORRES DEBENEDETTO (1), ALEJANDRA TAPIA (2), Defendants.	Criminal Case No. **08 CR 0249 BTM** INDICTMENT (Filed Jan. 30, 2008) Title 8, U.S.C., Sec. 1324(a)(2)(B)(ii) – Bringing in Illegal Aliens for Financial Gain; Title 8, U.S.C., Sec. 1324(a)(2)(B)(iii) – Bringing in Illegal Aliens Without Presentation; Title 18, U.S.C., Sec. 2 – Aiding and Abetting

The grand jury charges:

Count 1

On or about January 14, 2008, within the Southern District of California, defendants TINAMARIE TORRES DEBENEDETTO and ALEJANDRA TAPIA, with the intent to violate the immigration laws of the United States, knowing and in reckless disregard of the fact that an alien, namely, Isabel Bocanegra-Narvaez, had not received prior official authorization to come to, enter and reside in the United States, did bring to the United States said alien for the purpose of commercial advantage and private financial gain;

in violation of Title 8, United States Code, Section 1324(a)(2)(B)(ii), and Title 18, United States Code, Section 2.

Count 2

On or about January 14, 2008, within the Southern District of California, defendants TINAMARIE TORRES DEBENEDETTO and ALEJANDRA TAPIA, with the intent to violate the immigration laws of the United States, knowing and in reckless disregard of the fact that an alien, namely, Isabel Bocanegra-Narvaez, had not received prior official authorization to come to, enter and reside in the United States, did bring to the United States said alien and upon arrival did not bring and present said alien immediately to an appropriate immigration officer at a designated port of entry; in violation of Title 8, United States Code, Section 1324(a)(2)(B)(iii), and Title 18, United States Code, Section 2.

DATED: January 30, 2008.

A TRUE BILL:

/s/ [Illegible]
Foreperson

KAREN P. HEWITT
United States Attorney

By: /s/ D. Keehn
DOUGLAS KEEHN
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

July 2007 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. ALEJANDRA TAPIA (2), Defendant.	Criminal Case No. 08CR0249-BTM INDICTMENT **(Superseding)** (Filed Nov. 25, 2008) Title 8, U.S.C., Sec. 1324(a)(2)(B)(ii) – Bringing in Illegal Aliens for Financial Gain; Title 8, U.S.C., Sec. 1324(a)(2)(B)(iii) – Bringing in Illegal Aliens Without Presentation; Title 18, U.S.C., Sec. 2 – Aiding and Abetting; Title 18, U.S.C., Sec. 3146 – Bail Jumping (Felony)

The grand jury charges:

Count 1

On or about January 14, 2008, within the Southern District of California, defendant ALEJANDRA TAPIA and Tinamarie Torres Debenedetto, charged elsewhere, with the intent to violate the immigration laws of the United States, knowing and in reckless disregard of the fact that an alien, namely, Isabel Bocanegra-Narvaez, had not received prior official

authorization to come to, enter and reside in the United States, did bring to the United States said alien for the purpose of commercial advantage and private financial gain; in violation of Title 8, United States Code, Section 1324(a)(2)(B)(ii), and Title 18, United States Code, Section 2.

Count 2

On or about January 14, 2008, within the Southern District of California, defendant ALEJANDRA TAPIA and Tinamarie Torres Debenedetto, charged elsewhere, with the intent to violate the immigration laws of the United States, knowing and in reckless disregard of the fact that an alien, namely, Isabel Bocanegra-Narvaez, had not received prior official authorization to come to, enter and reside in the United States, did bring to the United States said alien and upon arrival did not bring and present said alien immediately to an appropriate immigration officer at a designated port of entry; in violation of Title 8, United States Code, Section 1324(a)(2)(B)(iii), and Title 18, United States Code, Section 2.

Count 3

On or about March 27, 2008, within the Southern District of California, defendant ALEJANDRA TAPIA did knowingly fail to appear as required before the United States District Court in San Diego, California, after having been released on or about January 16, 2008, pursuant to the Bail Reform Act of 1984 (Title

18, United States Code, Sections 3141-3150) in connection with the felony charges of bringing in illegal aliens for financial gain, in violation of Title 8, United States Code, Section 1324(a)(2)(3)(ii), bringing in illegal Aliens without presentation, in violation of Title 8, United States Code, Section 1324(a)(2)(B)(iii), and aiding and abetting, in violation of Title 18, United States Code, Section 2; all in violation of Title 18, United States Code, Section 3146.

DATED: November 25, 2008.

A TRUE BILL:

/s/ [Illegible]
Foreperson

KAREN P. HEWITT
United States Attorney

By: /s/ Jaime Parks
JAIME D. PARKS
Assistant U.S. Attorney

[1084] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. 08cr0249BTM
vs.	)	San Diego, California
ALEJANDRA TAPIA,	)	April 30, 2009
Defendant.	)	

Sentencing

BEFORE THE HONORABLE BARRY TED
MOSKOWITZ UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Karen P. Hewitt Jaime Parks Assistant United States Attorneys 880 Front Street San Diego, CA 92102
For the Defendant Tapia:	Federal Defenders Michelle Betancourt 225 Broadway San Diego, CA 92101
[1085] *Official Reporter*:	Barbara Harris CM/RPR/CRR 880 Front Street San Diego, CA 92101 619-990-3116

San Diego, California – April 30, 2009

THE CLERK: Number 4 on calendar, 08cr249, United States of America vs. Alejandra Tapia, on for sentence with presentence report.

THE COURT: Okay. This is Ms. Tapia; right?

MS. BETANCOURT: Ms. Tapia is now present before the court, your Honor. Michelle Betancourt, Federal Defenders, on behalf of Ms. Tapia.

MS. PARKS: Jaime Parks for the United States.

THE COURT: Is there any reason not to go ahead with sentencing?

MS. BETANCOURT: No, your Honor.

THE COURT: Did you read the presentence report?

MS. BETANCOURT: Yes, your Honor.

THE COURT: Did you read it also, Ms. Tapia?

THE DEFENDANT: Yes.

THE COURT: There is no addendum; correct?

MS. BETANCOURT: No, your Honor.

THE COURT: Did the two of you discuss the [1086] presentence report?

MS. BETANCOURT: We did.

THE COURT: You did?

THE DEFENDANT: Yes.

THE COURT: Did you find any mistakes in it?

THE DEFENDANT: No.

THE COURT: Ms. Betancourt?

MS. BETANCOURT: No.

THE COURT: Any objections to the presentence report?

MS. BETANCOURT: No, your Honor.

THE COURT: Why don't we go ahead with the government's recommendation first.

MS. PARKS: Your Honor, the government's recommending both that the plus 2 that Probation proposes for obstruction of justice in connection with the bail jump be imposed under the guidelines, and also a plus 2 for the uncharged conduct that Ms. Debenedetto testified to, the alien smuggling conduct.

But, additionally, and I think the biggest issue from my perspective, is the plus 2 for witness tampering.

THE COURT: "Give the rat her cheese"?

MS. PARKS: Exactly, your Honor. It was witnessed by a marshal, the declaration that I attached to my motion from the deputy marshal, Todd Loveless. I understand that –

[1087] THE COURT: And that was what she said, "Give the rat her cheese"; right?

MS. PARKS: She did, but she said it in the course of trial. That was – that's what the government has presented to the court.

There were some allegations made by Ms. Debenedetto that that was not the sum total of the matter, but the government felt more comfortable putting before the court the declaration of the United States Marshal as to what he actually heard.

But that happened in a crowded cell block with other people around, with other criminal defendants around, and I think it does merit the upward departure.

And I also think the guidelines are clear on that point that when the plus 2 for obstruction of justice doesn't take into account all of the obstructed justice related conduct, that an upward adjustment is appropriate.

THE COURT: Okay. So your recommendation overall?

MS. PARKS: My recommendation is – I guess the other thing that the government should address is the bail jump count should be consecutive.

I understand that Probation recommended that it be concurrent, but the statute requires that it be consecutive.

THE COURT: Right. I think Probation has the right idea but the wrong method; that what the guidelines say is if [1088] you figure out the guidelines, and Probation has the guidelines as 41 to 51, and so you would then have to break apart whatever sentence you were going to give, you would have to break it apart into a piece that is attributable to the bail jumping and it's consecutive to the other count, but the total is still within the guideline range.

MS. PARKS: Exactly. And then the government also proposes that the witness tampering conduct and the two prior instances of alien smuggling conduct be taken into consideration in her sentence. And it wasn't just Ms. Tapia's testimony – Ms. Debenedetto's testimony that we have with respect to those prior instances of smuggling.

There were also the receipts in the vehicle which I think substantiate, corroborate, her testimony, even though they were –

THE COURT: How many aliens were in the vehicle on the other two occasions?

MS. PARKS: I don't think there was testimony as to that.

THE COURT: But say she was charged with it all?

MS. BETANCOURT: It would be subsumed. I think the court is going to what I was going to respond; that the guidelines would actually take into account, if there had been up to 24 aliens, it would be subsumed in the upward adjustment to 18, because she would get a plus 3 for number [1089] of aliens.

So I think that the government's request for an upward adjustment for uncharged conduct in this case, which is based purely on the cooperating witness's testimony, no further corroboration. There is no interviews with material witnesses. There is not even any testimony as to how many material witnesses, whether it was in the same car. And it's only hotel receipts that the government is claiming corroborates these other instances. I think it's pretty scarce evidence.

Additionally, as I mentioned I think in the guidelines, 2L1.2, if we were to look and go through the guidelines, it actually does an enhancement for number of aliens.

THE COURT: If there were two people in each of the other transactions, and we don't know how many there were, under what circumstances, you would add three levels. That would be a 15. Then you would add the two levels for substantial risk of death or serious bodily injury to an 18.

MS. BETANCOURT: Exactly.

THE COURT: Right. So I don't think it would add. Now, the way it could add it is it could add mandatory minimums, but that is only if she is convicted, and I don't think – you know, the mandatory minimum is that it was done for profit. Who knows whether she was doing it for profit at [1090] the time.

I don't think that that really can be fairly determined. So even if you add up the aliens that group, it still wouldn't change the guideline calculation.

MS. BETANCOURT: Right. And I think that 5(k)2.2(1) indicates that if the guidelines do not adequately take into account for what in this case the government is asking for is an upward adjustment for the number of aliens, then you should look to 5(k)2.2(1).

And I think in this case if the government were to be able to establish, meet their burden that there were more than six people involved in the instant offense, then it just would be a plus 3 which would be subsumed by the already-agreed-upon increase to 18.

THE COURT: There was one other thing I wanted to point out if I can just get to it. Okay. So there is nothing else I want to add.

I agree with Ms. Betancourt. I wouldn't change anything.

MS. PARKS: The government agrees also, your Honor. I withdraw the recommendation for the plus 2 for the alien smuggling conduct.

However, I do still think it's eminently appropriate, given the witness tampering, that a plus 2 be considered there. So the government's recommendation of the [1091] guidelines calculation would then be an adjusted offense level of 22, 20 is what Probation recommends, with an additional plus 2 for the witness tampering conduct.

So that would change the recommendation I made on the sentencing summary chart to 51 months on Counts 1 and 2 and 12 months on Count 3 to run consecutive.

THE COURT: So you're asking for a total of 63 months.

MS. PARKS: Yes, your Honor.

THE COURT: Okay.

MS. BETANCOURT: Your Honor, with respect to the witness tampering, I think that the government has to meet their burden that that is an appropriate upward departure in this case and I would ask for a hearing on that.

We do have the declaration from the marshal, but I think we would have to hear whether Ms. Debenedetto actually heard it. There is nothing in the record to say that she actually heard it, was actually intimidated, or actually threatened by it.

THE COURT: Did she deny she made the comment?

MS. BETANCOURT: Yes, Ms. Tapia does deny she made the comment.

MS. PARKS: I have no objection to an evidentiary hearing, your Honor.

THE COURT: You know, I don't think an evidentiary [1092] hearing is really going to get us anywhere. I don't think it would change the sentence. So I am going to not take that into account. There is so much here that it is just not going to – it wouldn't change the sentence.

If I made a determination she said it or didn't say it, I wouldn't change the sentence. Because assuming she said it, it could be just frustration. Here is a person she was associated with and when people cooperate there is some kind of feeling of abuse of trust or breach of trust that they trusted the person, even if it was in crime, and it was during the course of a trial, she was upset, things obviously weren't going her way, and she made a statement. If she made that statement, it's not clear that it was with the intent to intimidate the witness.

So even if she made it, I wouldn't give much weight to it under the circumstances. It's kind of an odd statement, and I think the oddness of the statement, if it was made, shows that if it was made it was made under circumstances of frustration, not an attempt to influence the witness.

So under those circumstances, even if it were said I wouldn't add anything to it. There are so many

other things that are problematic in this case and the court has to make sure that the sentence isn't greater than necessary to accomplish the purposes we are supposed to accomplish. It [1093] just wouldn't add anything.

So I am not going to grant an evidentiary hearing and I am not going to take it into account.

MS. BETANCOURT: Thank you, your Honor. Then, your Honor, if I may address what our recommendation is.

Your Honor, we are recommending the minimum mandatory of 36 months in this case, but we are very much in agreement with the probation officer's analysis in the presentence report.

Ms. Tapia I think was very candid in her interview with Ms. Hernandez, and I think Ms. Hernandez actually fully captured that in the presentence report.

In particular, I would just like to note, Ms. Tapia is only 29 years old but she has already experienced a lot, much more than maybe most 29-year-olds, in that she started her entry into motherhood at a very, very young age.

And I think due to that she never really gave herself a chance to grow up, to mature, and actually to deal with some of the issues that she had been affected by as a young child.

Ms. Tapia has had several contacts with law enforcement, but by far this sentence is going to be

the longest she has ever been in custody, and actually the time she has now been in custody is the longest she has ever been in custody, if the court looks at the other contacts.

[1094] In speaking with her and reviewing the presentence report, she is more than prepared to make this time of use. She is prepared to better her parenting skills, to develop more skills so that she can be a productive member of society.

As the court sees, she does have her certificate as an LVN that she did use for several jobs, and would like to continue in that work.

She also wants to be able to take advantage of the time to work on her own mental and emotional issues that I think will hopefully get her back on the right path.

With that, your Honor, I think that her letter to the court expressed her remorse for failing to appear.

THE COURT: Can I ask you this: Assuming or implying that she has accepted responsibility for failing to appear, but she hasn't accepted responsibility for the underlying offenses of conviction, Counts 1 and 2, the alien smuggling charges, how does that change things? And is that the way you view the record also?

MS. BETANCOURT: I do view the record – I believe that she does warrant acceptance of responsibility. I think under the guidelines she would have to accept responsibility as to all three counts in order

to get the acceptance of responsibility under 3(e)1.1, but I think it's something that the court can consider in either varying from the guidelines [1095] or under 3553(a) factoring in an appropriate sentence.

THE COURT: But she hasn't accepted responsibility –

MS. BETANCOURT: As to the alien smuggling –

THE COURT: – as to Counts 1 and 2. Right?

MS. BETANCOURT: No, your Honor.

THE COURT: Am I correct?

MS. BETANCOURT: There are no admissions made, no.

THE COURT: Am I correct?

MS. BETANCOURT: Yes. I'm sorry. Yes, your Honor is correct, she has not accepted responsibility as to those.

THE COURT: So the Probation Department guideline calculations are correct. It's a base offense level of 18. You increase – it's a base offense level of 12. It increases to 18 under 2L1.1(b)(6) because of where the witness – the two aliens were in the gas tank compartment. Right?

MS. BETANCOURT: Yes.

THE COURT: Which creates a substantial risk of death or serious bodily injury; correct? Do you agree with that?

MS. BETANCOURT: Yes, your Honor.

THE COURT: And obstruction of justice for the failure to appear, plus 2.

MS. BETANCOURT: Correct.

[1096] THE COURT: So adjusted offense level of 20. No acceptance of responsibilities deduction.

MS. BETANCOURT: Correct, your Honor.

THE COURT: And you also have a minor role.

MS. BETANCOURT: I did. I did argue for a minor role in this case. Ms. Tapia, even if we were to take what the material witness said, all she did was serve as a passenger and sat there.

At most what she said, if we are to believe Ms. Debenedetto, is that they were coming from the grandmother's house. Ms. Debenedetto was the one that talked about the stickers on the car. She was the one that coordinated.

And, again, if we are to believe what she said, if anything Ms. Tapia might have served as an interpreter for the smugglers that Ms. Debenedetto already knew and continued to have contact with post-arrest through phone calls, in fact telling them

to stop alien smuggling because she had already been arrested and been in trouble.

So I think here a minor role adjustment is warranted, or at least for the court to consider that, compared even just to Ms. Debenedetto, Ms. Tapia's role was substantially less culpable than Ms. Debenedetto's and the other people who were organized –

THE COURT: I don't think – Ms. Debenedetto didn't get a minor role adjustment; right?

[1097] MS. BETANCOURT: I don't know that, your Honor. I don't have – the court departed significantly in her case. I don't remember.

THE COURT: Because of cooperation.

MS. BETANCOURT: I don't remember if it was based on role or not.

THE COURT: Partly because of her cooperation and partly for other reasons.

MS. BETANCOURT: She originally was sentenced to eight months.

THE COURT: Right.

MS. BETANCOURT: And then I think cooperation got her to six months.

THE COURT: Right. And that included a departure.

MS. BETANCOURT: Correct.

THE COURT: But not for cooperation.

MS. BETANCOURT: Not cooperation as to eight months no.

MS. PARKS: There was no minor role adjustment, your Honor.

THE COURT: All right. Anything else?

MS. BETANCOURT: No, your Honor.

THE COURT: I don't think minor role is appropriate. I think they were both in it together. They knew they were transporting somebody in a very dangerous way [1098] that could have resulted in death or serious bodily injury to the person. So I think the people who do that, when they are equally involved, the mere fact that it's only a one-steering wheel vehicle, only one person can drive, the mere fact that she was the driver and not the passenger, doesn't make her a minor role.

She wasn't in one of the typical passenger cases the window dressing or the add-on; she was equally involved with Ms. Debenedetto. And I don't think that she was less culpable than the average participant.

Okay. Anything else?

MS. PARKS: Your Honor, if I may, just on the acceptance of responsibility point, I think that any downward departure the court might consider should be weighed against the conduct in the state

offense; that she was found in a trailer she wasn't supposed to be in.

And it wasn't just the possession of the sawed-off shotgun. There was drug paraphernalia all over the trailer, all those meth pipes. None of this evidence came in at trial obviously, but I think it is relevant here at sentencing, and relevant in terms of whether any downward variance or departure should be given for acceptance of responsibility.

Not only were there the meth pipes and the sawed-off shotgun, but there were also pieces of mail. And the defendant made statements to the arresting officer claiming [1099] responsibility for all of those items. So I think that that should be in the court's mind.

Thank you, your Honor.

THE COURT: Anything further?

MS. BETANCOURT: Just to point out, your Honor, that she did – she was taken to court on that offense, so that has been taken into account in the calculation of the guidelines on her Criminal History Category. So, although Ms. Parks wants the court to consider it in determining whether she has accepted responsibility or not as to that, her Criminal History Category has been increased due to that conduct, and those circumstances already, by increasing it to a Criminal History Category III.

THE COURT: Anything further?

MS. BETANCOURT: Nothing further.

THE COURT: You have the right to address the court. Is there anything you wish to say prior to sentencing?

THE DEFENDANT: No.

THE COURT: Look, she was really going down the wrong road here. I do understand that there is a prior background where she has been sexually and physically abused since she was a teenager and I'm concerned about that and she needs help. There were attempts to get her help and she really wasn't availing herself of that.

[1100] She then gets involved in this alien smuggling activity, and then she fails to appear. And when she was finally – she failed to appear and stayed away for a period of months. And then when she was finally arrested, she had a sawed-off shotgun, she was using methamphetamine, and she had stolen mail that she possessed to commit identity theft.

So she was engaged in a lot more serious activity than the alien smuggling when she failed to appear. So it wasn't that she failed to appear and tried to rehabilitate herself and do something for her benefit. She was a fugitive and engaging in criminal conduct, and that is of serious concern to the court.

The nature and circumstances of the offense, she was involved in alien smuggling with Debenedetto, smuggling aliens in a way that could substantially –

or that did substantially create – or created a substantial risk of death or serious bodily injury.

The nature and history of her, of the defendant, she is a 29-year-old woman. Actually she is 30 now, right, because she was born in March of '79.

She has a history of being abused, both sexually and physically, and I think that a lot of times that gives people a low esteem and then they associate with the wrong people, and she was associating – boy, was she associating with the wrong people, and she continued to associate with |1101| the wrong people.

The meth, sawed off shotgun, the stolen mail for identity theft is really, really of concern to the court, that it needs to be addressed both during the period of incarceration and on supervised release, which the term of supervised release will be three years to effect addressing that.

The offense here is smuggling aliens, it is serious, and the way it was done, a sufficient sentence has to be imposed for that.

It has to deter – the sentence has to deter criminal conduct by others, and it has to protect the public from further crimes of the defendant. And the sentence, that's a big factor here, given her failure to appear and what she did out on bail.

She also has a prior marijuana possession for sale case, 66 pounds of marijuana, so she has a prior conviction. This is not her first felony conviction.

The sentence has to be sufficient to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program.

The guideline range is as calculated, it's the 41 to 51 months. And the sentence has to be sufficient to effect the purposes of 3553(a) but not greater, but it also has to avoid unwarranted sentencing disparities among [1102] defendants with similar records who have been found guilty of similar conduct.

Here I have to say that one of the factors that – I am going to impose a 51-month sentence, 46 months plus five months for the bail jump, and one of the factors that affects this is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program, number one.

Number two, to deter her from committing other criminal offenses. This isn't her first offense. She does have that prior marijuana possession for sale conviction, and that is what is really of concern. And what pushes it even further is that while she is out on bail, she was ready to engage in identity theft, she was using meth, and she was in possession of a sawed-off shotgun.

A sawed-off shotgun, whether it was hers or her boyfriend's or whatever, but it was in the trailer, and she admitted her connection to it to the police officers.

But putting the sawed-off shotgun aside, the identity theft, the fact that she was launching into a

new criminal career while she was a fugitive really is of concern to the court and that's something that motivates imposing a sentence that in total is at the high end of the guideline range.

I decline to depart further for the government's [1103] recommended obstruction of justice. I'm not going to take that into account. Even if the government proved it I wouldn't add anything. If they didn't prove it, it wouldn't make the sentence less. So an evidentiary hearing is unnecessary there.

Defendant is committed to the custody – do you wish me to go through any of the factors under 3553 further, provide any further reasons?

MS. BETANCOURT: No, your Honor, I think that's sufficient.

THE COURT: I think that a sentence less than what I am imposing would not deter her and provide for sufficient time so she could begin to address these problems. And I am going to recommend that she serve her sentence at FCI Dublin where they have the facilities to really help her, and I think that this is the necessary sentence for all the reasons I stated, and it's the least sentence that can be imposed to effect all these reasons.

The defendant is committed to the custody of the Bureau of Prisons on Count 1 and Count 2 for 46 months concurrent to each other.

She is committed to the custody of the Bureau of Prisons on Count 3 for five months consecutive to the

sentence on Count 1 and Count 2, for a total of 51 months.

The court recommends, strongly recommends, that she [1104] participate in the 500 Hour Drug Program and that she serve her sentence at FCI Dublin/Pleasanton.

I recommend that institution because I think they have the appropriate tools and rehabilitation, people there to help her, to start to make a recovery here.

She is then on three years of supervised release on all counts concurrent under the following terms and conditions, all of which are listed on the two pages the clerk gave her.

She is to report to the Probation Department within 72 hours of her release.

She's to obey all laws, federal, state, and local, and abide by the rules and regulations of the Probation Department.

She is not to possess a firearm, dangerous weapon, or explosive device.

She is not to possess or use a narcotic drug or controlled substance unless she has a lawful medical prescription.

She is to participate in a program of alcohol and abuse treatment, including testing and counseling with at least one to eight tests per month and one to eight counseling sessions per month as directed by the Probation Department.

When she finishes that program she is on the [1105] mandatory drug testing condition of two more tests during the course of supervised release, but the court authorizes up to four tests per month to avoid relapsing.

She is to cooperate as directed in the collection of a DNA sample.

She is to report all vehicles she owns, operates, or has an interest in to the Probation Department.

She is to disclose all of her personal, business, and financial records to the Probation Department at their request.

She is to submit her person, residence, office, or vehicle to a search conducted by a United States Probation Officer at a reasonable time and a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation.

Defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

She is to participate in a program of mental health treatment, and by that, she needs counseling, for all the adduce [sic] she suffered to help her get a better sense of herself and more self-esteem.

And the Probation Department is free to release the materials they have to the mental health provider for the [1106] purposes of diagnosis and treatment.

The defendant has to consent to the mental health provider releasing to the court and the Probation Department all treatment status and mental health condition information for the purposes of supervision.

She is to report all vehicles she owns, operates, or has an interest in to the Probation Department.

She is not to enter Mexico without the written permission of the Probation officer.

She is not to associate with persons she knows to be drug traffickers or users. And if she follows that she'll be staying away from drugs.

So if you go to a party and people are using drugs, you have to leave. You can't associate with those people.

You are to maintain full-time employment or education or combination of both.

She is financially unable to pay a fine. There is three $100 penalty assessments. The court suggests imposing it at the rate of $3 per month through the Inmate Financial Responsibility Program with the balance due in six months of release.

Any objection to that?

MS. BETANCOURT: No objection to that.

THE COURT: She has the right to appeal. Do you have any other objections?

[1107] MS. BETANCOURT: No, your Honor. My only request is her son's grandmother, who she is actually fairly close with and does take her son down to visit every so often, once she establishes a rapport with her probation officer, does the court – I know the wording is that the court does not allow her to go to Mexico unless –

THE COURT: She is not to enter Mexico without the written permission of the Probation officer.

MS. BETANCOURT: Right. So as long as that it's known that she does have that, and hopefully the request is granted, otherwise I guess we'll come back to the court.

THE COURT: Right.

MS. BETANCOURT: That was my only other clarification.

THE COURT: She has the right to appeal. I agree with your analysis. She has the right to appeal. To appeal she would have to file a notice of appeal with the Clerk of the District Court within ten days of the entry of the sentence or she will forever lose her right to appeal.

She has a right to have a lawyer represent her on appeal without cost to her.

MS. BETANCOURT: Thank you, your Honor.

MS. PARKS: Thank you.

(This matter was in recess.)

[1108] CERTIFICATION

I hereby certify that I am a duly appointed, qualified and acting official court reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated: June 18, 2009 at San Diego, California

S/Barbara Harris

Barbara Harris, Official Reporter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

(Filed May 1 ~~Apr. 31~~, 2009)

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(For Offenses Committed On or After November 1, 1987)
ALEJANDRA TAPIA (2)	Case Number: 08CR0249-BTM
	M. BETANCOURT, FEDERAL DEFENDER'S INC. Defendant's Attorney

REGISTRATION NO. 06933298

THE DEFENDANT:

pleaded guilty to count(s) _____

X was found guilty on count(s) 1s, 2s, 3s _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offense(s):

Title & Section	**Nature of Offense**	**Count Number(s)**
8 USC 1324(a)(2)(B)(ii)	Bringing In an Illegal Alien for Financial Gain	1s
8 USC 1324(a)(2)(B)(iii)	Bringing In an Illegal Alien Without Presentation	2s
18 USC 2	Aiding and Abetting	
18 USC 3146	Bail Jumping	3s

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____.

x The underlying counts are dismissed on the motion of the United States.

Assessment: $300.00 payable at a rate of $3.00 per month through the inmate financial responsibility program with the balance due within 6 months of release.

X Fine ordered waived.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

April 30, 2009
Date of Imposition of Sentence

/s/ Barry Ted Moskowitz
BARRY TED MOSKOWITZ
UNITED STATES DISTRICT JUDGE

Entered Date:

IMPRISONMENT

x The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FORTY-SIX (46) MONTHS as to counts 1s and 2s concurrently, FIVE (5) MONTHS as to count 3s consecutive to counts 1s and 2s for a total sentence of FIFTY-ONE (51) MONTHS.

x The court **STRONLY** [sic] recommends to the Bureau of Prisons:

THAT THE DEFENDANT PARTICIPATE IN THE 500 HOUR DRUG PROGRAM.
THE COURT ALSO RECOMMENDS THAT THE DEFENDANT SERVE HER SENTENCE AT FCI DUBLIN/PLEASANTON.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ by 12:00 noon on or to this court by 2:00 p.m.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS concurrent as to all counts.

MANDATORY CONDITIONS

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons unless removed from the United States.

The defendant shall not commit another federal, state or local crime.

The defendant shall cooperate as directed in the collection of a DNA sample, pursuant to 18 USC 3583(d).

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, but not more than 4 times per month, unless defendant is removed from the United States.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

> If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court. The defendant shall also comply with any special conditions imposed.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

_x_ Submit person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

_x_ Not possess firearms, explosive devices, or other dangerous weapons.

_x_ Not possess any narcotic drug or controlled substance without a lawful medical prescription.

___ If deported, excluded, or allowed to voluntarily leave the United States, obey all laws federal, state and local and not reenter the United States illegally and report to the probation officer within 72 hours of any reentry to the United States; the other conditions of supervision are suspended while the defendant is out of the United States after deportation, exclusion, or voluntary departure.

_x_ Participate in a program of drug and alcohol abuse treatment including testing and counseling, with at least 1 to 8 tests per month and 1 to 8 counseling sessions per month as directed by the probation officer.

_x_ Report all vehicles owned or operated, or in which you have an interest, to the probation officer.

___ Not enter the United States illegally.

_x_ Cooperate as directed in the collection of a DNA sample.

_x_ Provide complete disclosure of all personal and business financial records to the probation officer when requested.

___ Resolve all outstanding warrants within sixty (60) days of release from custody.

___ Remain in your place of residence for a period of ___ days, except while working at verifiable employment, attending religious services or undergoing medical treatment

___ Enter and successfully complete a residential drug program of at least 4 months in duration.

___ Complete ___ hours of community service in a program approved by the Probation officer within ___ months.

___ Reside in a Sober Living Facility for a period of _1_ year commencing upon release.

_x_ Participate in a program of mental health treatment as directed by the probation officer. The Court authorizes the release of the pre-sentence report and available psychological evaluations to the mental health provider, as approved by the probation officer. The defendant shall consent to the release of evaluations and treatment information to the probation officer and the Court by the mental health provider.

_x_ Not associate with known drug traffickers or users.

_x_ Not enter Mexico without the written permission of the probation officer.

_x_ Maintain full-time employment or education or a combination of both.

___ If the defendant has complied with all conditions of Supervised Release for ___, Supervised Release may be terminated on application to the Court and good cause shown.

---

376 Fed.Appx. 707, 2010 WL 1513838 (C.A.9 (Cal.))

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter *See* Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. *See also* Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Alejandra TAPIA, Defendant-Appellant.
No. 09-50248.

Submitted April 5, 2010.*

Filed April 16, 2010.

Arnold Dale Blankenship, Assistant U.S., Office of the U.S. Attorney, San Diego, CA, for Plaintiff-Appellee.

Michelle Betancourt, Esquire, Doug Keller, Federal Public Defender, Federal Defenders of San Diego, Inc., San Diego, CA, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of California, Barry T. Moskowitz,

---

* This panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

District Judge, Presiding. D.C. No. 3:08-CR-00249-BTM.

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

MEMORANDUM**

Alejandra Tapia appeals from the 51-month sentence imposed following her jury-trial conviction for bringing in an illegal alien for financial gain, in violation of 8 U.S.C. § 1324(a)(2)(B)(ii), bringing in an illegal alien without presentation, in violation of 8 U.S.C. § 1324(a)(2)(B)(iii), aiding and abetting, in violation of 18 U.S.C. § 2, and bail jumping, in violation of 18 U.S.C. § 3146. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Tapia contends that the district court committed plain error by basing her 51-month sentence on speculation about whether and when Tapia could enter and complete the Bureau of Prison's 500-hour drug abuse treatment program. No reversible error was committed. *See United States v. Duran*, 37 F.3d 557, 561 (9th Cir.1994); *see also United States v. Waknine*, 543 F.3d 546, 554 (9th Cir.2008).

AFFIRMED.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 10, 2010

Mr. Doug Keller
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101

Re: Alejandra Tapia
v. United States
No. 10-5400

Dear Mr. Keller:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JAN 3 1 2011
OFFICE OF THE CLERK

No. 10-5400

In The
Supreme Court of the United States

ALEJANDRA TAPIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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65 IPDU

QUESTION PRESENTED FOR REVIEW

May a district court give a defendant a longer prison sentence to promote rehabilitation, as the Eighth and Ninth Circuits have held, or is such a factor prohibited, as the Second, Third, Eleventh, and D.C. Circuits have held?

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OPINIONS BELOW

The court of appeals' decision is unpublished, *United States v. Tapia*, 376 F. App'x 707, 2010 WL 1513838 (9th Cir. Apr. 16, 2010). *See* Joint Appendix ("JA") at 43-44. There is no district court decision, but the transcript of the sentencing hearing is at JA 9-33.

JURISDICTION

The court of appeals' judgment was entered on April 16, 2010. The Court has jurisdiction. 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Relevant statutory provisions are in the appendix attached hereto. App. 1-7.

STATEMENT

Petitioner Alejandra Tapia is 31 years old. She lived with her parents until they divorced when she was six. After the divorce, Petitioner lived with her mother and her mother's boyfriend. When she was only eight, Petitioner was regularly sexually abused by her mother's boyfriend. Petitioner's mother knew about the abuse but did nothing to stop it. The molestations continued for about four years, until Petitioner was sent to live with her aunt in Tijuana,

Mexico. Supplemental Joint Appendix Under Seal ("S. JA") at 7-8.

A year later, Petitioner ran away with a boyfriend who also physically abused her. Petitioner became pregnant and, at 14, gave birth to her first child. In 1995, Petitioner, now 16, became pregnant again and fled to California. Once there, she gave birth to a daughter, who died days later. S. JA 8.

In 2000, Petitioner married a man who would physically abuse her. She had two children with this man before leaving him. During this time, she was convicted of two offenses: driving without a license and selling marijuana. S. JA 6, 8.

In January 2008, Petitioner and her friend, Tinamarie Debenedetto, were driving from Mexico into the United States. At the border, an immigration official questioned both about their plans. The official noticed that Ms. Debenedetto was acting nervously. He also smelled gasoline. He scrutinized the car more closely. He eventually found two individuals – later determined to be undocumented aliens – concealed in the driver's gas tank compartment. Petitioner and Ms. Debenedetto were arrested and taken into custody. S. JA 3.

Petitioner was indicted on two counts: (1) bringing in illegal aliens for financial gain and aiding and abetting in violation of 8 U.S.C. §1324(a)(2)(B)(ii) and 18 U.S.C. §2; and (2) bringing in illegal aliens without presentation and aiding and abetting in violation of

8 U.S.C. §1324(a)(2)(B)(iii) and 18 U.S.C. §2. JA 4-5. Two days after Petitioner's arrest, the district court released Petitioner and ordered her to comply with various conditions. S. JA 4.

In March 2008, Petitioner failed to appear in court for a motion hearing. A bench warrant was issued for her arrest. Petitioner was apprehended six months later in an apartment that contained methamphetamine, a shotgun, and mail that belonged to other individuals. S. JA 4, 6. Prior to conclusion of the federal case, Petitioner pled guilty to a state gun-possession charge. S. JA 6.

The Government filed a superseding indictment, adding a third count charging bail jumping in violation of 18 U.S.C. §3146. JA 6-8. On December 19, 2008, a jury found Petitioner guilty on all three counts.

At sentencing, the district court calculated the adjusted Guideline offense level for Petitioner's alien smuggling conviction as 20.[1] JA 20-21. Because Petitioner fell into Criminal History Category III, her Guideline range was 41 to 51 months. JA 13.

---

[1] The district court reached that result because the base offense level for each offense is 12. U.S.S.G. §2L1.1(a)(3). That offense level was then increased to 18 for the way in which the aliens were smuggled, putting them at a substantial risk of death or bodily injury. U.S.S.G. §2L1.1(b)(6). JA 20-21. The district court also imposed a two-level increase for obstructing or impeding justice for fleeing while on bail. JA 21; *see* U.S.S.G. §3C1.1.

Petitioner maintained she should receive a sentence of no more than three years, the mandatory minimum penalty. She argued that a higher sentence would be greater than sufficient to meet the congressionally mandated goals of sentencing in 18 U.S.C. §3553(a), given the abuse she suffered throughout her life and the fact that she had never served even one year in custody before. JA 18-19.

The district court acknowledged the physical and sexual abuse Petitioner had suffered, stating, "I'm concerned about that and she needs help." JA 25. Reviewing the relevant sentencing factors, the district court opined that Petitioner needed to take part in the 500-hour drug-treatment program (the Residential Drug Abuse Program, or RDAP), which the Bureau of Prisons offers in some of its facilities to selected prisoners. The district court stated, "[t]he sentence has to be sufficient to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program." JA 27.

The court imposed a sentence of 51 months, focusing on the importance of the drug-treatment program:

> Here I have to say that one of the factors that – I am going to impose a 51-month sentence, 46 months [for alien smuggling] plus five months for the bail jump, and one of the factors that affects this is the need to provide treatment. In other words, so she is in long

> enough to get the 500 Hour Drug Program, number one.

JA 27.

The district court noted the importance of deterrence, given Petitioner's escalating criminal conduct but returned to the drug-treatment program a third time, stating,

> I think that a sentence less than what I am imposing would not deter her and provide for sufficient time so she could begin to address these problems. And I am going to recommend that she serve her sentence at FCI Dublin where they have facilities to really help her, and I think that this is the necessary sentence for all the reasons I stated, and it's the least sentence that can be imposed to effect all those reasons.

JA 28.

For a fourth and final time, the district court cited the treatment goal in its custodial housing recommendation:

> The court recommends, strongly recommends, that she participate in the 500 Hour Drug Program and that she serve her sentence at FCI Dublin/Pleasanton.
>
> I recommend that institution because I think they have the appropriate tools and rehabilitation, people there to help her, to start to make a recovery here.

JA 29. The court ordered that Petitioner serve three years of supervised release. Here, too, the district court, consistent with its reasoning on the custodial sentence, expressed concern with substance-abuse issues: It required that Petitioner participate in a drug-abuse program and made a particular point that she stay away from drug users or dealers. JA 29, 31.

On appeal, Petitioner challenged the district court's imposition of increased imprisonment for rehabilitative purposes, based upon its hope that she would qualify for the Bureau of Prisons RDAP program. She acknowledged that, in *United States v. Duran*, 37 F.3d 557, 561 (9th Cir. 1994), the Ninth Circuit sanctioned imposing lengthier prison sentences based upon rehabilitation considerations. Finding no conflict with the language in 18 U.S.C. §3582(a) "that imprisonment is not an appropriate means of promoting correction and rehabilitation," *Duran* held that this language restricted only the decision to impose a prison term, that once a court decided to imprison, it was free to lengthen a selected term to promote rehabilitation. *See id.* Petitioner argued that *Duran* was wrongly decided in light of *In re Sealed Case,* 573 F.3d 844 (D.C. Cir. 2009), and *United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007), and inconsistent with the later decision in *United States v. Kikuyama*, 109 F.3d 536 (9th Cir. 1997).

The Ninth Circuit affirmed, stating that there was no error in basing Petitioner's sentence on anticipation of RDAP enrollment, citing *Duran*. *See Tapia*, 376

F. App'x at 707. In fact, the district court's expectation has proven wrong, and the Bureau of Prisons has not allowed Petitioner entry into its RDAP program.

SUMMARY OF ARGUMENT

When Congress restructured federal criminal sentencing law in 1984, it rejected the "rehabilitative model," whereby imprisonment is viewed as a legitimate tool to reform offenders. Congress expressed its disapproval of using incarceration for rehabilitative purposes in several parts of the Sentencing Reform Act.

One of those places Congress repudiated incarceration for rehabilitative purposes was in its instructions to sentencing judges on the procedure for imposing imprisonment at 18 U.S.C. §3582(a):

> **Factors to be considered in imposing a term of imprisonment.** – The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements

issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

As recognized by the Third and District of Columbia Circuits,[2] the plain language of this statute bars imposing or increasing a prison term to promote rehabilitation. The ordinary rules of grammar require that the language in §3582(a) reflecting Congress's rejection of the "rehabilitative model" ("recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation") be parsed in one of only two ways: as a participial phrase modifying the subject of the sentence or as an absolute construction modifying the sentence as a whole. Under either analysis, the "recognizing" phrase includes within its grammatical scope *both* the first "in determining" phrase describing imposition of imprisonment and the second one referencing length of imprisonment.

The contrary analysis of the Ninth, Eighth, and Sixth Circuits,[3] linking the "recognizing" phrase to the first "in determining" phrase only, has no grammatical basis and contravenes the last antecedent rule by construing the restrictive language as applying exclusively to a more distant antecedent, the phrase referencing the imposition of sentence – in

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[2] *Manzella*, 475 F.3d 152; *Sealed Case*, 573 F.3d 844.

[3] *Duran*, 37 F.3d 557; *United States v. Hawk Wing*, 433 F.3d 622 (8th Cir. 2006); *United States v. Jimenez*, 605 F.3d 415 (6th Cir. 2010).

effect skipping over the phrase discussing the length of incarceration.

This conclusion of the D.C. and Third Circuits is confirmed by resort to extrinsic interpretation aids. First, the structure of the Sentencing Reform Act, when viewed under the traditional rule of specific-over-general, indicates that the potential conflict perceived in *Duran* does not exist: There is no conflict between §3582(a)'s recognition that prison-based rehabilitation is an inappropriate consideration in determining length of sentence and the mandate to consider 18 U.S.C. §3553(a)'s sentencing factors. The specific ban on considering rehabilitation applies only to sentencing decisions imposing or increasing incarceration; the general exhortation to consider rehabilitative goals applies to sentencing decisions in general.

Further confirmation is seen in the way Congress drafted the *in pari materia* directives to the Sentencing Commission in 28 U.S.C. §§991 & 994. For these latter provisions, other circuits have recognized that the ban on rehabilitative considerations for imprisonment is fully compatible with rehabilitation as a general goal of criminal sentencing.[4] Moreover, the *Duran* approach requires attributing to Congress at least two illogical choices. First, *Duran* supposes that Congress would not allow placing defendants in prison for rehabilitative purposes, yet would allow keeping

---

[4] *See United States v. Harris*, 990 F.2d 594 (11th Cir. 1993); *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992).

defendants in prison longer for the same reasons. Second, *Duran* attributes to Congress a restriction on use of rehabilitative concerns that would apply to only a small minority of sentencings after passage of the Sentencing Reform Act, those in which a sentence of probation is possible. And, as illustrated by the facts of this case, the *Duran* analysis ties mandatory judicial sentencing policy to factors over which judges have no control but that are wholly within the discretion of the Bureau of Prisons.

Further confirmation lies in the legislative history of the Sentencing Reform Act. The adoption of the Sentencing Reform Act demonstrates Congress's intentions regarding three central points: to reject the "rehabilitative model"; to reserve imprisonment to serve the goals of deterrence, incapacitation, and retribution only; and to use §3582(a) to codify these findings for *both* imposing and setting the length of prison terms. The principal Senate committee report on the Sentencing Reform Act, as well as the Court's discussion in *Mistretta v. United States*, 488 U.S. 361, 367 (1989), prominently acknowledges Congress's rejection of the discredited "rehabilitative model." The Senate report likewise demonstrates – consistent with this rejection – that rehabilitative concerns were to be addressed by non-custodial sentencing options; incarceration was meant to serve other sentencing goals. Finally, the history of amendment of §3582(a) during the legislative process manifests a deliberate excision of rehabilitation as a consideration in the decisions to impose a prison term or to extend its

length. Hence, legislative history entirely accords with the plain-reading analysis of the Third and D.C. Circuits and refutes the Ninth Circuit's contention that the statute was poorly or inattentively drafted.

Even if the plain meaning, interpretative aids, and legislative history did not unwaveringly point to the broad-scope reading of §3582(a), the significant ambiguity perceived by those courts following *Duran* must be resolved by application of the Rule of Lenity. That rule, which applies equally to sentencing provisions as to substantive penal statutes, requires courts to adopt the alternative reading more favorable to the accused when such ambiguity arises. If §3582(a) is indeed ambiguous, permitting the reading adopted in *Duran*, Petitioner's interpretation is nonetheless required by the Rule of Lenity and accords with the policy underpinnings of the Rule.

ARGUMENT

I. 18 U.S.C. §3582(a) Bars District Courts Imposing or Increasing Prison Terms to Promote Rehabilitation.

A. Introduction

Because the district court ensured that Petitioner's term of imprisonment was sufficiently lengthy to permit Petitioner to participate in a prison-based rehabilitation program, the legality of her sentence

turns on interpretation of 18 U.S.C. §3582(a), a provision entitled "Imposition of a sentence of imprisonment."[5] Section 3582(a) provides, in relevant part, the following:

> Factors to be considered in imposing a term of imprisonment. – The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

18 U.S.C. §3582(a).

The D.C. and Third Circuits have construed §3582(a) to preclude district courts from increasing the length of a sentence of imprisonment in order to accomplish the defendant's rehabilitation. *See Sealed Case*, 573 F.3d 844; *Manzella*, 475 F.3d 152.[6] That proscription applies both when a sentencing court makes the decision to sentence the defendant to a term of imprisonment, rather than imposing lesser

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[5] *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("not[ing] that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute") (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)).

[6] *But see Jimenez*, 605 F.3d at 424; *Hawk Wing*, 433 F.3d at 629-30; *Duran*, 37 F.3d at 561.

sanctions such as a term of probation, *see* 18 U.S.C. §3551(b)(1), or a fine, *see id.* § (b)(2), and to the determination of the length of the term of imprisonment. *See Manzella*, 475 F.3d at 160 (holding that "the plain language of §3582(a) . . . extend[s] its prohibition to a court's determination of the length of the sentence.") (quotation omitted). *Accord Sealed Case*, 573 F.3d at 849. *See also United States v. Tsosie*, 376 F.3d 1210, 1220-21 (10th Cir. 2004) (O'Brien, J., dissenting) (citing §3582(a) and 28 U.S.C. §994(k) and observing that "[e]ven a tin ear can discern the *leitmotif* – defendant rehabilitation, treatment or care cannot drive the incarceration decision either at the threshold or as to length"). The Court's traditional approach to statutory construction, under which it examines the statute's "text, structure, purpose and history," *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 861 (2005) (quotation omitted), reveals that the Third and D.C. Circuits have interpreted §3582(a) correctly.

B. Because the "Recognizing" Phrase Either Modifies "the Court" or the Entire Sentence, It Applies to Both of the Sentencing Court's Tasks: Determining Whether to Imprison and Determining the Length of Any Term of Imprisonment.

Under "settled principles of statutory construction," the Court "first determine[s] whether the statutory text is plain and unambiguous." *Carcieri v.*

Salazar, 129 S. Ct. 1058, 1063 (2009). *See also Alexander v. Sandoval*, 532 U.S. 275, 288 n.7 (2001) (observing that "the interpretive inquiry begins with the text and structure of the statute . . . "). "If it is, [the Court] appl[ies] the statute according to its own terms." *Id.* at 1063-64.

The statutory language is indeed plain and unambiguous. Congress set forth the general power to imprison in 18 U.S.C. §3581(a): "A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment." Section 3582(a) addresses the district court's imposition of a sentence of imprisonment as authorized by §3581(a). The plain language of §3582(a) provides direction to district courts in undertaking two separate duties. The first is "determining whether to impose a term of imprisonment." *See* 18 U.S.C. §3582(a). The second duty is "determining," in the event that a term of imprisonment is imposed, "the length of the term." *See id.* ("in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term"). In undertaking those two functions, the statute directs district courts to "consider the factors set forth in section 3553(a) to the extent that they are applicable. . . ." *Id.* The final phrase in the sentence – "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" – is most properly read to refer back to "[t]he court," the entity that has been directed, in performing its two functions, to "consider the factors set forth in section 3553(a) to the extent

that they are applicable. . . ." *Id.* Thus, decisions by sentencing courts on (1) the threshold question of whether to incarcerate and (2) the secondary question of how long a particular term of imprisonment should be, must be based upon the understanding that serving time in prison does not "promot[e] correction and rehabilitation." *Id.* The district court therefore erred in sentencing Petitioner to a lengthier term of imprisonment for the purpose of affording her an opportunity to participate in a prison-based drug-treatment program.

While §3582(a) is perhaps not elegantly structured, the reading adopted by the Third and D.C. Circuits vindicates the Court's observation that "[t]he primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar." *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897). The phrase "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" is a participial phrase,[7] and such phrases "always serve as adjectives, modifying nouns or pronouns." *See* H. Ramsey Fowler & Jane E. Aaron, *The Little, Brown Handbook* 179 (7th ed. 1998). The subject of the sentence contained in §3582(a) is, of course, "the court" while the object is "the factors set

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[7] *See generally* Diana Hacker, *The Bedford Handbook* 806 (6th ed. 2002).

forth in section 3553(a)." The most sensible reading of the sentence is one in which the "recognizing" participial phrase modifies "the court"[8] rather than "the factors."[9] Thus, the sentencing court, in performing its dual obligations to determine whether to impose a term of imprisonment and, if it chooses to impose such a term, to determine the length of the term of imprisonment, must "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. §3582(a).[10]

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[8] *See The Oxford Guide to English Usage* 204 (E. S. C. Weiner & Andrew Delahunty, eds., 2d ed. 1993) ("A participle used in place of a verb in a subordinate clause must have an explicit subject to qualify. If no subject precedes the participle within the clause, the participle is understood to qualify the subject of the main sentence.").

[9] Of course, if the §3553(a) factors could somehow "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. §3582(a), that reading would also benefit Petitioner: because §3582(a) directs the sentencing court to consider those factors, to the extent that the factors "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation," the district court must do so also.

[10] Petitioner's reading, under which the participial phrase at the end of the sentence modifies a noun at the beginning of the sentence, is grammatically sound. While a participial phrase is perhaps best placed near the noun it modifies, *see generally* Roy H. Copperud, *American Usage and Style: The Consensus* 250 (1980), "participial phrases are often movable[, and] may . . . appear at some distance from the word they modify." *See* Hacker, *The Bedford Handbook* 806-07. Moreover, the notion that the court would simultaneously (1) consider the factors and (2) recognize that the commencement or continued service of a term of

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The only other plausible reading of the "recognizing" phrase is as an absolute construction.[11] While an absolute construction "usually consists of a noun followed by a participle or participial phrase," Hacker, *The Bedford Handbook* 394, that subject can be implied. *See, e.g., American Heritage Book of English Usage* 2 (American Heritage Dictionaries eds. 1996) (providing the following example of an absolute construction currently in use in conversation: "*Barring bad weather,* we plan to go to the beach tomorrow.") (emphasis in original). Such a phrase "modifies the whole sentence." Hacker, *The Bedford Handbook* 394. *Accord American Heritage Book of English Usage* 1 ("[A]n absolute construction modifies the rest of the sentence, not the subject of the sentence (as a participial phrase does)."). Thus, if the "recognizing" phrase here is read as an absolute construction, it modifies the entire sentence, which necessarily includes both of the sentencing court's two functions: determining whether to impose a term of imprisonment and determining how long any term of imprisonment will be. This reading of the phrase as an absolute construction is also consistent with the placement of

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imprisonment does not promote rehabilitation is also consistent with the use of a present participle ("recognizing") in the participial phrase: "The present participle shows action occurring *at the same time* as that of the verb." Fowler & Aaron, *The Little, Brown Handbook* 223 (emphasis in original). *Accord* Copperud, *American Usage and Style: The Consensus* 250.

[11] An absolute construction may also be referred to as an absolute phrase or an ablative absolute.

the "recognizing" phrase at the end of the sentence: "Absolute phrases may appear at the beginning or at the end of a sentence." Hacker, *The Bedford Handbook* 394. *Accord id.* 810 (noting that "[a]n absolute phrase . . . may appear nearly anywhere in the sentence"). Thus, whether read as a participial phrase or an absolute construction, the "recognizing" phrase supports Petitioner's reading under which the court must "recogniz[e]" that it can neither decide to imprison nor lengthen the term of imprisonment for the purpose of prison-based rehabilitation.

The Ninth Circuit's contrary reading, based upon its prior decision in *Duran*, 37 F.3d 557, does not honor the plain language of §3582(a). According to *Duran*,

> [s]ection 3582 distinguishes between the determinations of whether to impose a term of imprisonment and of the actual length of the imprisonment. It admonishes the court to recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation. Once imprisonment is chosen as a punishment, however, §3582 does not prohibit consideration of correction and rehabilitation in determining the length of imprisonment.

Id. at 561.[12] The Ninth Circuit provides no explanation why it believes the statute "distinguishes" between the two "determinations" at issue, the initial decision to impose a sentence of imprisonment and the determination of the term's length. The structure of the sentence strongly suggests otherwise; it has a single subject ("the court"), a single verb ("shall consider"), and a single object ("the factors"). Thus, in making both determinations – which are described in two prepositional phrases joined by a conjunction – "[t]he court . . . shall consider the factors set forth in section 3553(a) to the extent that they are applicable. . . ." 18 U.S.C. §3582(a). Nothing in that structure suggests that the determination of the length of a term of imprisonment is in any way analytically distinct from the initial determination to impose a sentence of imprisonment. Nor does anything in the structure of that sentence suggest that the description of the court as "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" would not equally inform each of these determinations.

Duran also suggested that Congress might have drafted a different statute if it had not intended to

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[12] Petitioner will address only *Duran*, as the Third Circuit correctly observed that the Eighth Circuit's decision in *Hawk Wing* adds nothing to the Ninth Circuit's analysis. *See Manzella*, 475 F.3d at 160 (citing *Hawk Wing*, 433 F.3d at 629-30). Nor does the Sixth Circuit's decision in *Jimenez* contain any additional reasoning. *See* 605 F.3d at 424.

limit the court's "recogni[tion] that imprisonment is not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. §3582(a), to the initial determination whether to impose a term of imprisonment at all.

> If Congress had intended to prohibit sentencing judges from considering correction and rehabilitation in setting the length of the sentence, it could have enacted a statute that admonished judges to recognize "that imprisonment *or the length of imprisonment* is not an appropriate means of promoting correction and rehabilitation." It did not enact such a statute in 18 U.S.C. §3582. We decline to extend the prohibition in §3582 to sentence length determinations.

Duran, 37 F.3d at 561 (emphasis in original). The meaning of the statute, as set forth above, is plain enough, and, as the Third Circuit observed: "The possibility that a clearly worded statute might be even more clearly worded does not negate the fact that it is already clear." *Manzella*, 475 F.3d at 160. In short, "Congress had no need to provide such clarification given the statute's express instruction that sentencing courts must recognize the inappropriateness of imprisonment for rehabilitation both in choosing imprisonment rather than a non-incarceration sentence and 'in determining the length of the term.'" *Sealed Case*, 573 F.3d at 850 (quoting 18 U.S.C. §3582(a)).

Although it offered no reasoning in support of that conclusion,[13] the Ninth Circuit appears to have found that the term "imprisonment" in the last phrase of §3582(a) refers to only the initial decision to imprison the defendant and not to the determination of the duration of the imprisonment. That reading is not supported by the dictionary meaning of the term:

> Nor would the addition of the phrase "or the length of imprisonment" [– as suggested in *Duran* –] add anything that the term "imprisonment" on its own doesn't already convey. According to the dictionary, "imprisonment" means "[t]he action of imprisoning, *or* [the] fact or condition of being imprisoned." OXFORD ENGLISH DICTIONARY (2d ed.1989) (emphasis added). In context as well, "imprisonment" encompasses the decision to imprison a defendant for a longer period of time.

Sealed Case, 573 F.3d at 850. Thus, under the standard definition, a court complying with the statutory command to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation" would neither impose nor extend a term of imprisonment for rehabilitative purposes.

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[13] *See Manzella*, 475 F.3d at 159 ("It is unclear what legal basis this argument has. . . .").

As the D.C. Circuit explained, application of both aspects of the dictionary definition of "imprisonment" makes sense in the context of §3582(a):

> [a] sentencing court deciding to keep a defendant locked up for an additional month is, as to that month, in fact choosing imprisonment over release. If the sentencing court adds the extra month to make a defendant eligible for a prison drug treatment or educational program, it fails to recognize that "imprisonment" is not an appropriate means of promoting rehabilitation.

Id. Indeed, contrary to the Ninth Circuit's suggestion, Congress would likely have added words had it intended to limit the term "imprisonment" to only one component of its traditional meaning, rather than perceiving a need to add additional words to capture what is already a standard definition of the term.[14]

The Ninth Circuit's reading also introduces an odd asymmetry into an otherwise symmetrical sentence. It addresses two sentencing decisions – the decision to impose a term and the determination of its length – and it does so by way of a subject, verb, and object that are equally applicable to each function: It is the court that is directed to consider the §3553(a) factors in connection with each function. Given this

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[14] If the Ninth Circuit's reading of §3582(a) is, in fact, based upon choosing the most narrow possible reading of the term "imprisonment," that holding suggests ambiguity in that term, thus implicating the Rule of Lenity. *See* Part II, *infra*.

structure, it would be surprising to learn that the sentence also contained a participial clause that modified the noun "court" but only as to one of the two functions.[15]

Perhaps the Ninth Circuit's interpretation would be plausible if anything contained in the two prepositional phrases suggested the specialized meaning of "imprisonment" that *Duran* attributes to the participial phrase. There is nothing that does so. Rather, the word "imprisonment" is employed in both of the prepositional phrases that describe the court's activities: "The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term. . . ." 18 U.S.C. §3582(a). Thus, the word "imprisonment" is equally associated with both of the sentencing duties addressed in §3582(a).

Section 3582(a)'s prepositional phrases do not employ the term "imprisonment" in the special sense that the Ninth Circuit suggests: The term is not used to refer to the threshold decision to incarcerate. Rather, Congress employed the verb "to impose," not "to imprison" in both phrases. Using the verb "to imprison" (only) in the first of the two phrases would be a far more natural choice if Congress had intended (1) to adopt the specific meaning of imprisonment

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[15] If the phrase is read as an absolute construction, it would modify the entire sentence and would therefore apply to both functions by definition.

advocated in *Duran* and (2) to create different analytical models applicable to the decisions to impose a term of imprisonment and to determine the length of the term.

The D.C. Circuit surmised that the distinction advocated by the Ninth Circuit – which, at the time the decision in *Sealed Case* was issued, was also advocated by the government[16] – was based on the belief that the participial phrase modified only one of the "in determining" prepositional phrases.

> Section 3582(a)'s straightforward language leaves no room for the government's distinction between selecting prison rather than a non-prison sentence and imposing a longer term of imprisonment. As a textual matter, the government nowhere explains how the phrase "recognizing that imprisonment is not an appropriate means of promoting . . . rehabilitation" can modify section 3582(a)'s first clause ("in determining whether to impose a term of imprisonment") but not its second ("in determining the length of the term").

573 F.3d at 849. *Sealed Case* correctly notes that nothing in the participial clause suggests that it modifies only one of the two prepositional phrases.

Moreover, a reading of the "recognizing" phrase under which it modified the first of the prepositional

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[16] The Solicitor General agrees with Petitioner's reading of the statute.

phrases but not the second would be inconsistent with the last antecedent rule. *See generally Barnhart v. Thomas*, 540 U.S. 20, 26-27 (2003). Under that rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase it immediately follows. . . ." *Id.* at 26. Here, the "recognizing" phrase does not "immediately" follow the two prepositional phrases – it follows the phrase directing consideration of the §3553(a) factors – but if it is nonetheless to be read as modifying one of the two prepositional phrases, reading it to modify the first, rather than the last, is hardly consistent with the last antecedent rule. This rule suggests that the limiting phrase, if it applies to either prepositional phrase, would apply to the second, or last, such phrase.[17] Similarly, if the D.C. Circuit has correctly identified the rationale for *Duran*'s reading of §3582(a), that rationale's failure to comport with standard grammatical

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[17] The last antecedent rule does not undercut either interpretation of the "recognizing" phrase offered by Petitioner. If the phrase is interpreted as an absolute construction, Petitioner's reading comports with the last antecedent rule, as it follows the entire sentence, which is what is modified by an absolute construction. If the "recognizing" phrase is read as a participial phrase, *Thomas* is not to the contrary: The "rule is not an absolute and can assuredly be overcome by other indicia of meaning. . . ." *See Thomas*, 540 U.S. at 26. The "recognizing" phrase cannot sensibly be read to apply to the noun "factors" or the verb phrase "shall consider the factors." *See supra* at 15-16. Indeed, the participial phrase would be better placed at the beginning of the sentence, *see generally* William Strunk, Jr. & E. B. White, *The Elements of Style* 13-14 (3d ed. 1979), but "may appear nearly anywhere in the sentence." Hacker, *The Bedford Handbook* 810.

rules – i.e., that participial phrases modify nouns and absolute constructions modify entire sentences – is yet another reason to reject it.

Last, it is clear that the "recognizing phrase" is mandatory and not merely a guideline. Because the "recognizing" phrase is either a participial phrase modifying the "the court" or an absolute construction modifying the entire sentence, Congress's decision to prohibit courts from either imposing a term of imprisonment or increasing the length of such a term based upon a desire for prison-based rehabilitation is pellucid.[18] As an initial matter, the predicate of the sentence contained in §3582(a) – "shall consider" – is mandatory, signaling that Congress is *directing* district courts how to proceed in imprisonment decisions. *See generally United States v. Navarro-Vargas*, 408 F.3d 1184, 1205 (9th Cir. 2005) (en banc) (describing "shall" as mandatory terminology).

A court "recognizing," as it must under this mandatory provision, that "imprisonment is not an appropriate means of promoting correction and rehabilitation," *see* 18 U.S.C. §3582(a), does not act rationally if it chooses to imprison in order to afford a defendant an opportunity to participate in an in-prison rehabilitation program, nor does it act

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[18] "To acknowledge the existence or truth of; to admit knowledge or awareness of; to confess or avow," is an accepted definition of the verb *recognize*. *See Oxford English Dictionary*, http://www.oed.com/ (last visited Jan. 24, 2011).

rationally when it ensures that the defendant's sentence is long enough to permit such participation. A court purposefully imposing a term of imprisonment for those reasons necessarily chooses a "means" that it knows (or "recognizes") is "inappropriate" to effectuate its goals. That is an abuse of discretion. *Cf. Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). Thus, even the courts that mistakenly limit the reach of the "recognizing" phrase do not question that its effect is mandatory, not precatory. *See, e.g., Duran*, 37 F.3d at 561 (finding that §3582(a) "admonishes the court to recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation," and describing that admonition as a "prohibition" that *Duran* declined to extend "to sentence length determinations").

In short, regardless of whether the "recognizing" phrase is read as a participial phrase or an absolute construction, Congress requires district courts to "recogniz[e]" that neither the initial decision to imprison nor a decision to lengthen th term can advance the goal of rehabilitation. Because rational judges cannot both acknowledge that fact and con lude otherwise in a single case, Congress has barred imposing or lengthening terms of imprisonment on that basis.

C. The Structure of the Sentencing Reform Act Reveals a Purposeful Congressional Decision to Allow Courts to Consider Rehabilitative Concerns in Connection with Sentencing Decisions Except for Those That Involve Incarceration.

The Ninth Circuit also believed the structure of the Sentencing Reform Act and, in particular, §3582(a)'s reference to the factors set forth in §3553(a) support its reading of §3582(a). *See Duran*, 37 F.3d at 561 (noting that "§3553(a) includes 'correctional treatment' as a factor to be considered in determining sentence length."). While it is true that the Court looks to the structure of congressional enactments in construing their meaning, *see, e.g., McCreary County,* 545 U.S. at 861, the structure of the Sentencing Reform Act strongly supports Petitioner's reading of §3582(a).

The Sentencing Reform Act, in Chapter 227, sets forth a sentencing scheme that consists of four subchapters (A-D), entitled "General Provisions," "Probation," "Fines," and "Imprisonment." The first of these subchapters sets out the purposes that guide all sentencing: just punishment, deterrence, incapacitation, and rehabilitation. *See* 18 U.S.C. §§3553(a)(2)(A)-(D). The succeeding subchapters address the imposition of the three main types of sanctions available: probation, fines, and imprisonment. The general purposes of sentencing inform any sentence imposed. The individual subchapters guide the sentencing court in

the imposition of particular sanctions. And, as is the norm, the more specific implementation subchapters necessarily take precedence over the broader purposes contained in Subchapter A, "General Provisions."

The scheme directs that defendants be sentenced "so as to achieve the purposes set forth in subparagraphs (A) through (D) of §3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case." 18 U.S.C. §3551(a). That scheme contemplates three general categories of sanctions (probation, fines, and imprisonment), each of which is addressed in a separate subchapter:

> An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to –
>
> > (1) a term of probation as authorized by subchapter B;
> >
> > (2) a fine as authorized by subchapter C; or
> >
> > (3) a term of imprisonment as authorized by subchapter D.

Id., §§(b)(1)-(3). A fine may be imposed in addition to probation or a term of imprisonment, but at least one of these sanctions must be imposed in every case. *See id.* ("An individual . . . shall be sentenced. . . .").[19]

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[19] Other sanctions are also available. Section 3551(b) also refers to additional sanctions in the form of forfeiture (18 U.S.C.

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Thus, the §3553(a) factors inform the entire sentencing scheme, and imprisonment is but one option among three types of sanctions from which a court must choose in imposing sentence. *See* 18 U.S.C. §3551(b).

Section 3553(a) is entitled "Factors to be considered in imposing sentence." It provides that "[t]he court, in determining the particular sentence to be imposed, shall consider [the various factors set forth in subparagraphs (1) through (7)]." 18 U.S.C. §3553(a). As part of that mandate, the court must consider "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . ." 18 U.S.C. §3553(a)(2)(D). Even so, §3553(a), like §3551(b), employs the generic term "sentence." Section 3553(a) does so both in its general mandate ("[t]he court, in determining the particular *sentence* to be imposed, shall consider. . . ."), and in the specific direction contained in its subparagraph (2) ("[t]he court . . . shall consider . . . the need for the *sentence* imposed [to accomplish the four goals of sentencing]"). *See* 18 U.S.C. §3553(a), (a)(2)(A)-(D) (emphases added). The

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§3554), notice to victims (*id.*, §3555), and restitution (*id.*, §3556) that may be imposed in addition to those required by §3551(b). Imposition of a sentence of imprisonment, one of the alternative sanctions set forth in §3551(b), also gives rise to the authority to impose an additional sanction, a term of supervised release. *See* 18 U.S.C. §3583.

term "sentence" incorporates §3551(b)'s three potential sanctions – probation, fine, and imprisonment – at least one of which must be chosen by the sentencing court. *See id.*, §3551(b)(1)-(3). In light of that incorporation, the Ninth Circuit's claim that "§3553(a) includes 'correctional treatment' as a factor to be considered *in determining sentence length*," *see Duran*, 37 F.3d at 561 (emphasis added), is misinformed: Section 3553(a) contains no specific language referencing "sentence length" but rather is applicable to sentencing as a general matter and contemplates that the district court will choose from among the §3551(b) options: probation, fine, and imprisonment. *See* 18 U.S.C. §§3551(b)(1)-(3).

Imposition of each of the three penalties set forth in §3551(b) is governed by a separate statute. Each directs the court to consider the §3553(a) factors, and each has a structure that mirrors that of §3582(a). *See* 18 U.S.C. §3562(a) ("The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.").[20] Section 3562(a), which addresses the decision to impose a term of probation and decisions as to its length,

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[20] *See also* 18 U.S.C. §3572(a) ("In determining whether to impose a fine, and the amount, time for payment and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a), [various additional factors].").

plainly directs that the §3553(a) factors are relevant to both determinations. And yet, the Ninth Circuit concludes that the identically structured reference to §3553(a) contained in §3582(a) refers only to "determining sentence length," *see Duran*, 37 F.3d at 561, and not the decision to impose a term of imprisonment in the first instance. This is contrary to the structure of the scheme as a whole, in which §3553(a)'s purposes inform both the decision to select a particular sanction and the more quantitative decision regarding the length of a term of probation or imprisonment (or the amount of a fine).

It may be that the Ninth Circuit comes to its conclusion by supposing there is a conflict between §3553(a)'s mandate that a sentencing court consider the purpose of rehabilitation and §3582(a)'s command that courts "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. §3582(a). The conflict that the Ninth Circuit apparently sees is readily resolved by invocation of the familiar canon that "'a more specific statute will be given precedence over a more general one. . . .'" *Corley v. United States*, 129 S. Ct. 1558, 1568 (2009) (quoting *Busic v. United States*, 446 U.S. 398, 406 (1980)). Here, §3553(a) is the general statute.[21] It sets out the aims of sentencing in general and makes no reference to the specific sentences available

[21] It is contained within Subchapter A of Ch. 227, entitled "General Provisions."

under §3551(b). It interacts with more specific statutes that govern the imposition of particular types of sentence. *See Manzella*, 475 F.3d at 158 ("'Sentence' has a broad meaning. It includes many types of possible punishment [as set forth in §3551(b) and 18 U.S.C. §3583], only one of which is 'imprisonment.'").

Each of the specific statutes directs sentencing courts to "consider the factors set forth in section 3553(a)," but only "to the extent that they are applicable." *See, e.g.*, 18 U.S.C. §3582(a). Thus, Congress generally foresaw that there will be individual cases where certain §3553(a) factors will be inapplicable. However, it also made the more specific determination that a court deciding whether to impose a term of imprisonment, and deciding upon the length of that term, must "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." *Id.* That admonition obviously limits the contexts in which a sentencing court may consider "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . ," *see id.*, §3553(a)(2)(D), but *only* as to two determinations, (1) whether to impose a term of imprisonment, and (2) if such a term is imposed, how long it should be. This result "give[s] precedence" to the specific statute over the general. *See Corley*, 129 S. Ct. at 1568. Section 3553(a)(2)(D) still informs many sentencing decisions, including decisions regarding sentences to terms of probation, *see* 18 U.S.C. §3562(a), and sentences

to or including a fine. *See* 18 U.S.C. §3572(a). "So understood, the 'conflict' between §§ 3582(a) and 3553(a)(2)(D) wanes away: courts must consider a defendant's need for rehabilitation when devising an appropriate *sentence* (pursuant to §3553(a)(2)(D)), but may not carry out that goal by *imprisonment* (pursuant to §3582(a))." *Manzella*, 475 F.3d at 158 (emphasis in original).[22]

Once a court makes the determination to impose a term of imprisonment and decides upon its length – inquiries that do not implicate rehabilitative concerns – the sentencing court must nonetheless then turn to §3553(a)(2)(D), honoring its directive to consider the defendant's rehabilitative needs, "in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release. . . ." 18 U.S.C. §3583(c).[23] Because courts choosing a term of imprisonment will necessarily consider rehabilitation in connection with the decision to impose supervised release, *see id.*, and every sentence of probation or a fine also requires such consideration, *see id.*, §§3562(a), 3572(a), every *sentencing* decision necessarily implicates the rehabilitative concerns that courts are directed to "consider"

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[22] *Accord Sealed Case*, 573 F.3d at 850-51; *Harris*, 990 F.2d at 596.

[23] Here, again, the relevant factors are considered with respect to both the imposition of the term of supervised release and its length.

under §§3553(a) and (a)(2)(D). "Thus, far from creating the conflict [that *Duran* and its progeny] fear[], these provisions[, sections 3553(a) and 3582(a),] harmonize comfortably with each other in a rational scheme that retains the sentencing goal of rehabilitation but pursues this goal through means other than incarcerating a defendant or keeping him in prison longer." *Sealed Case*, 573 F.3d at 851.

The overall structure of the Sentencing Reform Act, as described in *Sealed Case*, is repeated and reinforced in directions that Congress gave to the Sentencing Commission. Congress identified, as a "purpose" of the Commission, "establish[ing] sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2). . . ." 28 U.S.C. §991(b)(1)(A). Congress imposed the duty to consider those factors on sentencing courts as well. *See* 18 U.S.C. §§3553(a) & (a)(2). Even so, the Commission was directed to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 U.S.C. §994(k). The last phrase, of course, is identical to that contained in §3553(a)(2)(D). Thus, Congress again excepted imprisonment decisions from the scope of its directive to consider the rehabilitative concerns set forth in §3553(a)(2)(D). As the Court put it, the Sentencing Reform Act "rejects imprisonment as a means

of promoting rehabilitation, 28 U.S.C. §994(k), and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals, 18 U.S.C. §3553(a)(2)." *Mistretta*, 488 U.S. at 367.

A number of circuit courts have interpreted §994(k) so as to complement Petitioner's interpretation of §3582(a). *See, e.g.*, *Manzella*, 475 F.3d at 157-58. *Manzella* agreed with "[t]he Second Circuit . . . that rather than prohibiting rehabilitation as a goal of *sentencing*, §994(k) 'stands for the significantly different proposition that rehabilitation is not an appropriate goal for *imprisonment*.'" *Id.* at 157 (quoting *Maier*, 975 F.2d at 946) (emphases in original). *Accord Harris*, 990 F.2d at 596. *See also Maier*, 975 F.2d at 946 (interpreting §994(k) to demonstrate that "Congress wanted to be sure that no defendant was locked up in order to put him in a place where it was hoped that rehabilitation would occur. Incarceration would have to be justified by such traditional penological purposes as incapacitation, general deterrence, specific deterrence, and retribution."). Section 994(k)'s "'prohibition relates only to the imprisonment part of a sentence and not to any other terms of a sentence. In fact, the precise factors that are not to be considered in imposing *imprisonment* are set forth by statute as factors to be considered in imposing *sentence*.'" *Manzella*, 475 F.3d at 159 (quoting *Harris*, 990 F.2d at 596) (emphases in original). The interpretation of the Second, Third, and Eleventh Circuits thus "give[s] precedence" to the specific injunction contained in §994(k) over the general edict contained

in §991(b)(1)(A). *See Corley*, 129 S. Ct. at 1568. Section 994(k) thus sets the Sentencing Commission on the same path Congress laid out for sentencing courts: It carves out imprisonment as the one aspect of sentencing to which rehabilitative concerns are largely inapposite.

D. The *Duran* Construction Conflicts with Congress's Conclusion That Incarceration Does Not Reform. It Permits Courts to Ignore This Conclusion in the Vast Majority of Sentencing Decisions and to Lengthen Imprisonment Based on Uncertain Placement in Prison Rehabilitation Programs.

While Petitioner's construction is fully supported by the text and structure of §3582(a) – as well as the text and structure of the Sentencing Reform Act – should the Court move beyond them to consider the "purpose[ ] and history," *see McCreary County*, 545 U.S. at 861 (citation omitted), of the Sentencing Reform Act, they only confirm Petitioner's construction. Even the cases following *Duran* acknowledge that Congress at least prohibited district courts from making the initial decision to imprison – rather than choose probation or a fine – based upon rehabilitative concerns. *See, e.g., Hawk Wing*, 433 F.3d at 630; *Duran*, 37 F.3d at 561. The cases adopting that interpretation have not offered a policy rationale; indeed, one acknowledged that "it is difficult to see a distinction between the imposition of a sentence of

imprisonment and the length of imprisonment. . . ." *United States v. Jackson*, 70 F.3d 874, 879-80 n.6 (6th Cir. 1995).

It is "difficult to see [such] a distinction" because, "[a]s a matter of logic, the [*Duran*] position is . . . untenable. If, as the [*Duran* line of cases] concedes, imprisonment is not an appropriate means of promoting rehabilitation, how can *more* imprisonment serve as an appropriate means of promoting rehabilitation?" *Sealed Case*, 573 F.3d at 849 (emphasis in original). *See also id.* at 850 (observing that "[a] sentencing court deciding to keep a defendant locked up for an additional month is, as to that month, in fact choosing imprisonment over release"). The D.C. Circuit illustrated its point with the facts of *Sealed Case*, a case in which the district court imposed a sentence long enough to ensure that an addicted defendant convicted of distributing controlled substances would have an opportunity to participate in prison-sponsored rehabilitative programs. *See id.* at 847.

> Under the [*Duran*] theory, the district court would err by choosing imprisonment rather than, say, probation to help defendant "benefit from some of the programs and educational training and the medical treatment that is available in the federal prison system," Sentencing Tr. 31, yet would commit no error by choosing to keep defendant in prison longer to benefit from those same programs that would be "more available and more useful for [him] over a somewhat longer period

> of time than . . . over a very short period of time," *id.* at 31-32.

Sealed Case, 573 F.3d at 849.[24] Ultimately, the *Duran* interpretation must be based upon a congressional determination that *sending* someone to prison is "not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. §3582(a), but *keeping* someone there is.[25] Nothing in the Sentencing Reform Act reveals why that would be the case.

Sealed Case discusses one way in which *Duran* supposes Congress to have acted irrationally, by concluding that prison does not rehabilitate while allowing courts to increase imprisonment for rehabilitative purposes. A further incongruity is *Duran*'s assumption that Congress, having rejected the rehabilitative model, nevertheless allowed it to flourish in the majority of cases. It would be odd for a Congress that was so concerned about the inefficacy of prison-based

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[24] As a further illustration, it would be permissible under *Duran* for a district court planning to sentence a defendant to 30 days in custody to increase that sentence to a year based on a 12-month prison drug treatment program, but it would be error to impose the same 12-month sentence if the sentencing court had initially contemplated a term of probation including, as a condition, a 30-day term in a halfway house.

[25] The legislative history, *see* Part I.E, *infra*, demonstrates that Congress almost certainly did not reach that conclusion. *See generally Mistretta*, 488 U.S. at 366 ("referr[ing] to the 'outmoded rehabilitation model' for federal criminal sentencing, and recogniz[ing] that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed") (quoting S. Rep. No. 98-225 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182).

rehabilitation[26] to draft a statute that permitted rehabilitation concerns to play a significant role in the majority of judicial decisions regarding imprisonment. Under the *Duran* reading of §3582(a), the limitation on considering prison-based rehabilitation applied only when a court was deciding whether there should be any imprisonment at all. Only then would the sentencing court be barred from ordering imprisonment for the purpose of "promoting correction and rehabilitation." 18 U.S.C. §3582(a).

But after passage of the Sentencing Reform Act, such decisions constitute a distinct minority of a sentencing court's decisions regarding imprisonment. There are numerous offenses for which a sentence of probation simply may not be imposed. *See generally* 18 U.S.C. §§3561(a)(1) (a sentence of probation is not permitted for Class A or Class B felonies),[27] (b)(2) (a sentence of probation is not permitted when expressly precluded by statute).[28] Moreover, upon passage of the Sentencing Reform Act, district court sentencing discretion was tightly cabined by Congress's decision to make compliance with the Sentencing Commission's Guidelines mandatory:

> the court shall impose a sentence of the kind, and within the [Guideline] range, referred to

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[26] *See Mistretta*, 488 U.S. at 366-67.

[27] A Class A felony carries a maximum sentence of life in prison, while the maximum for a Class B felony is 25 years in prison. *See* 18 U.S.C. §§3581(b)(1), (2).

[28] *See, e.g.*, 21 U.S.C. §841(b)(1)(A) (barring probation for certain drug offenses).

> in [18 U.S.C. §3553(a)(4)] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. §3553(b)(1).[29] Thus, sentences not involving imprisonment were authorized only in the relatively unusual situation in which a probationary sentence was authorized by the Sentencing Commission.

Initially, the Guidelines Manual authorized probation only where the minimum sentence in the Guideline range was six months or less. *See* U.S.S.G. §5B1.1(a)(2) (1988). The 1988 Guideline Manual contained 43 offense level designations and six Criminal History Categories, resulting in 258 potential Guideline ranges, only 42 of which permitted a sentence of 6 months or less. *See id.* Thus, the great majority of sentencing decisions offered little or no opportunity for courts to contemplate meaningfully the merits of a probationary sentence – or a fine – as an alternative to a sentence to a term of imprisonment. Yet §3582(a), as read by *Duran*, authorized courts to impose additional prison time for the purpose of "promoting correction and rehabilitation" – by way of sentences within the Guideline range or based upon upward departure – in cases where imprisonment was a certainty and only the length of the term was in

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[29] The Guidelines are now advisory. *See United States v. Booker*, 543 U.S. 220 (2005).

question. That category of sentencing decisions embraced the vast majority of post-Sentencing Reform Act cases. There is no policy reason explaining why a Congress that rejected the rehabilitative model[30] would have crafted a statute of such limited application.[31]

Finally, it is unlikely that Congress would adopt a policy allowing courts to fix the length of prison sentences based on prison-run rehabilitation programs. Unlike conditions of probation or supervised release, which the sentencing court may dictate, district courts have no authority to place prisoners in the custody of the Bureau of Prisons into particular facilities or programs. As the Third Circuit observed,

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[30] *See Mistretta*, 488 U.S. at 367.

[31] In enacting the Sentencing Reform Act, Congress specifically instructed the Sentencing Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." 28 U.S.C. §994(m). Numerous commentators view §994(m) as "inviting the commission to set guidelines that would result in more persons being imprisoned for longer prison terms." *See, e.g.*, Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 268 (1993). *Accord* Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 Stan. L. Rev. 37, 41 & n.14 (2005); Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 Wash. U. L.Q. 205, 212 & n.36 (1993). The likelihood that Congress sought longer prison terms makes it even less plausible to construe §3582(a) as limiting the role of rehabilitative concerns only to those cases where imprisonment was uncertain.

> sentencing judges have no authority to order the Bureau of Prisons to place a defendant in any given rehabilitative program that might be offered, though they may offer recommendations. . . . Allowing a judge to issue a specific term of imprisonment based on the uncertain placement of a defendant in a rehabilitative program is a practice Congress was unwilling to endorse.

Manzella, 475 F.3d at 158.

The instant case illustrates *Manzella*'s point: Petitioner has neither participated in the drug-treatment program contemplated by the district court nor is she housed in the facility it recommended. Although the district court "strongly" recommended that Petitioner be enrolled in RDAP and that she be housed at FCI Dublin, specifically because of the facilities and treatment options available there, JA 29, 36, neither of these requests will seemingly be honored by the Bureau of Prisons. Petitioner has, to date, not had the clinical interview required for enrollment in RDAP, although that interview must normally be scheduled no less than 24 months from the inmate's scheduled release date. *See* Bureau of Prisons, *Program Statement P5330.11* §2.5.9 (Mar. 16, 2009). The deadline for Petitioner's interview was October 17, 2010. Moreover, the RDAP requires a minimum of six to nine months to complete. *See id.* §2.5.10; 28 C.F.R. §550.53(a)(1). The inmate must be eligible to complete all three components of the program *at the time of intake* to be enrolled in the first place. *See* 28 C.F.R.

§550.53(a)(1). These rules create a cut-off time for Petitioner's enrollment of no later than January 2011, if she is to obtain the benefit of early release, allowing her to go on to the community-based component of RDAP. *See* 28 C.F.R. §550.53(a)(3).[32] Moreover, even the district court's request for placement at FCI Dublin, due to its specific programs and facilities, has not come to fruition; Petitioner is currently housed at FMC Carswell. *See* Bureau of Prisons, *Inmate Locator*, http://www.bop.gov (last visited Jan. 21, 2011). Consequently, none of the rehabilitative "benefits" intended by the district court's increased custodial sentence will be achieved.

In short, Congress adopted in §3582(a) a policy under which courts would neither commit defendants to prison nor extend those commitments for rehabilitative purposes and, rather, saw the courts' role as limited to making recommendations as to prison facilities. *See* 18 U.S.C. §3582(a) ("In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 USC §994(a)(2)."). *Duran*'s reading of

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[32] There is also some question whether the Bureau of Prisons has classified Petitioner as categorically ineligible for RDAP for having a firearm conviction on which she is still serving a state probationary term. *See* 28 C.F.R. §550.55(b)(5)(ii) (inmates ineligible for RDAP if they have a "current felony conviction" for firearm possession).

§3582(a) is thus inconsistent with policy goals of the Sentencing Reform Act taken as a whole.

E. Legislative History Confirms the Plain Meaning of the Act.

Where statutory language is clear, there is no need to consider extrinsic sources in determining meaning. This is a fundamental rule of statutory interpretation: "When . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." *Rubin v. United States*, 449 U.S. 424, 430 (1981) (quotation and citations omitted). This Court has said that "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461 (1987) (quoting *United States v. James*, 478 U.S. 597, 606 (1986), *abrogated on other grounds by Central Green Co. v. United States*, 531 U.S. 425, 436 (2001)).

But this rule contains its own limitation: "[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (citing *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940)). So although the meaning of 18 U.S.C. §3852 is plain on its face, an examination of its legislative history is appropriate to confirm that Congress's intent is not contrary to that plain meaning.

See, e.g., James, 478 U.S. at 606-08 (examining the historical record in order to "conclude that the legislative history fully supports attributing to the unambiguous words of the statute their ordinary meaning").

The legislative history of the Sentencing Reform Act "fully supports attributing to the unambiguous words of the statute their ordinary meaning." *Id.* at 608. An examination of that history yields three relevant conclusions. First, Congress rejected the rehabilitative model of sentencing and the practice of "coercive rehabilitation" which previously held sway in federal courts. Second, Congress intended that imprisonment would be used for the aims of deterrence, incapacitation, and just punishment, while probation and supervised release would be used to promote rehabilitation. Third, Congress intended §3582 to prevent courts from imposing or lengthening a term of imprisonment for rehabilitation.

1. Congress rejected the "rehabilitative model" of sentencing.

Title 18 U.S.C. §3582 became law as part of the Sentencing Reform Act of 1984. The Act rejected the rehabilitative model, which supposed offenders would be reformed while in prison and then be released under supervision. For much of the country's history, federal criminal statutes set maximum penalties for crimes and left judges wide discretion to impose a fine, a term of probation, or a prison sentence on a

convicted offender. *See Mistretta,* 488 U.S. at 363. Beginning in 1910, the judge's role was supplemented by a system of parole: Having served some portion of their custodial sentence, offenders could be released from prison under the supervision of a parole officer. *Id.*; *see also Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938). The aim of this regime was the offender's rehabilitation. *Mistretta*, 488 U.S. at 363. It was thought that the parole commission's power to release an offender encouraged inmates to reform themselves. Reform took place in prison: The parole commission released only those offenders who, in its view, had been sufficiently rehabilitated. S.Rep. No. 98-225, at 40 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3223 ("Senate Report"); Stith & Koh, *supra*, at 227.

In passing the Sentencing Reform Act, Congress rejected the rehabilitative model. By the 1970s, there was widespread dissatisfaction with it. Chief amongst the criticisms was that the rehabilitative model had failed on its own terms: It did not reform offenders. This criticism is given broad airing in the Senate Report which accompanied the Act. That report is the primary extrinsic evidence of Congress's intent in enacting sentencing reform. *See Mistretta*, 488 U.S. at 366. It is replete with evidence of Congress's dissatisfaction with then current sentencing practice:

> [A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can

> really detect whether or when a prisoner is rehabilitated.

Senate Report at 38, *as reprinted in* 1984 U.S.C.C.A.N. at 3221. Congress explicitly rejected the practice of "coercive rehabilitation," whereby a prisoner's release depends upon his completion of correctional programs.

> At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of "coercive" rehabilitation – the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons.
>
> Recent studies suggest that this approach has failed, and most sentencing judges as well as the Parole Commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.

Senate Report at 40, *as reprinted in* 1984 U.S.C.C.A.N. at 3223.

Congress not only believed the old model had failed to achieve its goals but also feared that the use of prison for rehabilitation had led to needless incarceration of the poor and disadvantaged. And so, in drafting the Sentencing Reform Act, Congress sought

to ensure the end of such practices. For example, explaining the Act's directive to the Sentencing Commission to "assure that the guidelines and policy statements, in recommending a term of imprisonment *or length of a term of imprisonment*, reflect the general inappropriateness of considering education, vocational skills, employment record, family ties and responsibilities, and community ties," 28 U.S.C. §994(e) (emphasis added), the Senate Report states:

> As discussed in connection with subsection (d), each of these factors [listed in §994(e)] may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community.
>
> The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.

Senate Report at 174-75, *as reprinted in* 1984 U.S.C.C.A.N. at 3357.

Similarly, in discussing the Act's directive to the Sentencing Commission that the guidelines and policy statements should be "entirely neutral as to race, sex, national origin, creed, and socioeconomic status of offenders," 28 U.S.C. §994(d), the Senate Report explained:

> The Committee added [this] provision to make it absolutely clear that it was not the purpose . . . to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training.

Senate Report at 171, *as reprinted in* 1984 U.S.C.C.A.N. at 3357-58. It further provided:

> Indeed, in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training. This qualifying language in subsection (d), when read with the provisions in proposed §3582(a) of Title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the sole purpose[33] of rehabilitation, makes clear that *a defendant should not be sent to prison only because the prison has a program that "might be good for him."*

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[33] Congress's use of "sole purpose" here is ambiguous. There are two possible readings of this sentence. The first is that §994(k) bars the imposition of imprisonment only when rehabilitation is the "sole" purpose that incarceration would serve. The second possible reading is that imprisonment may be imposed for any of the purposes of sentencing, except rehabilitation, the "sole" purpose that may not justify imprisonment. The former reading may seem more natural. But the latter is far more consistent with the whole of the Senate Report.

Senate Report at 171, n.531 (emphasis added), *as reprinted in* 1984 U.S.C.C.A.N. at 3357-58.

Congress did not dismiss rehabilitation as an aim of sentencing, but it intended that, even where imprisonment might aid in reform, courts would incarcerate only for other purposes:

> Subsection (k) makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided. A term imposed for another purpose may, however, have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence.

Senate Report at 176, *as reprinted in* 1984 U.S.C.C.A.N. at 3359.

Where incarceration is required for other purposes, but rehabilitation is an appropriate secondary purpose of a sentence, courts are to address it other than by lengthening a prison term:

> Subsection (a) specifies, in light of current knowledge, that the judge should recognize, in determining whether to impose a term of imprisonment, "that imprisonment is not an appropriate means of promoting correction and rehabilitation." This caution concerning the use of rehabilitation as a factor to be considered in imposing sentence is to discourage the employment of a term of imprisonment on the sole ground that a prison has a program that might be of benefit to the prisoner. This does not mean, of course, that

> if a defendant is to be sentenced to imprisonment for other purposes, the availability of rehabilitative programs should not be an appropriate consideration, for example, in recommending a particular facility.

Senate Report at 119, *as reprinted in* 1984 U.S.C.C.A.N. at 3302. *See also Sealed Case*, 573 F.3d at 851 (court may consider "rehabilitative needs for other reasons, such as in selecting a *shorter* term of imprisonment or in imposing a non-incarceration sentence.") (emphasis in original).

Congress's consistent view that a need for rehabilitation could not justify imposing or lengthening prison sentences is reflected, as well, in its judgment concerning what extraordinary circumstances might support reducing a sentence. Having renounced the use of prison to rehabilitate an offender, the Act rejects the idea that the offender's actual rehabilitation could justify reducing a prison sentence:

> The subsection specifically states, *consistent with the rejection by the committee of the rehabilitation theory as a basis for determining the length of a term of imprisonment*, that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" for reducing the sentence.

Senate Report at 179, *as reprinted in* 1984 U.S.C.C.A.N. at 3362 (discussing what was codified as 28 U.S.C. §994(t)'s directive that the Commission formulate guidelines for reduction of long sentences pursuant to 18 U.S.C. §3582(c)(1)(A)) (emphasis added).

Because imprisonment is to be employed only for deterrence, incapacitation, or punishment, and rehabilitation is to play no role in selection of a particular term, an offender's actual rehabilitation will not justify reducing his sentence. Using "rehabilitation theory to determine the length of a term of imprisonment" was the way the old regime worked. The Sentencing Reform Act was intended to, and did, sweep away this sentencing practice. *See Mistretta*, 488 U.S. at 366.

2. Congress intended that prison would be used to deter, incapacitate, and punish and that probation and supervised release would be used to rehabilitate.

While Congress rejected the former rehabilitative model, it did not reject rehabilitation as an aim in sentencing. Congress instructed that courts should consider deterrence, incapacitation, just punishment, *and* rehabilitation in selecting among sentencing options. But Congress intended that a court will make use of probation or supervised release when its primary concern is rehabilitation. On the other hand, when that court's primary aim is deterrence, incapacitation, or punishment, Congress intended that it achieve these aims through imprisonment. Throughout the Senate Report, Congress contrasts the very different purposes of these sentencing options:

> The purpose of rehabilitation may play an important role in sentencing an offender to a term of probation with the condition that he

> participate in a particular course of study, while the purposes of just punishment and incapacitation may be important considerations in sentencing a repeated or violent offender to a relatively long term of imprisonment.

Senate Report at 68, *as reprinted in* 1984 U.S.C.C.A.N. at 3251; *see also id.* at 91, *as reprinted in* 1984 U.S.C.C.A.N. at 3274 (imprisonment more effective for punishment, deterrence, or incapacitation while probation preferable for correction or rehabilitation).

Where concerns for punishment, deterrence, and incapacitation predominate, imprisonment is to be imposed:

> [I]f the Commission finds that the primary purpose of sentencing in a particular kind of case should be deterrence or incapacitation, and that a secondary purpose should be rehabilitation, the recommended guideline sentence should be imprisonment.

Senate Report at 76, n.288, *as reprinted in* 1984 U.S.C.C.A.N. at 3259, n.288.

On the other hand, where rehabilitation is the primary aim in imposing sentence, Congress intended courts to utilize probation. *Id.* at 76, *as reprinted in* 1984 U.S.C.C.A.N. at 3259 (rehabilitation is particularly important in formulating conditions of probation); *id.* at 76-77, *as reprinted in* 1984 U.S.C.C.A.N. at 3259-60 (rehabilitation important in determining

whether a sanction other than a term of imprisonment appropriate in a particular case).

Where concerns of deterrence, incapacitation, or punishment otherwise required a prison sentence, Congress intended that supervised release would serve the rehabilitative purposes of probation:

> The committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release – that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term . . . or to provide rehabilitation to a defendant who has spent a fairly short period in prison.

Id. at 124, *as reprinted in* 1984 U.S.C.C.A.N. at 3307.

When particular offender characteristics point to a need for rehabilitation, that may call for a sentence of probation, intermittent confinement, or community service, rather than imprisonment, for example:

> A defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service . . . as a condition of probation or supervised release.

Id. at 173 n.532, *as reprinted in* 1984 U.S.C.C.A.N. at 3356 n.532. The Committee also believed that:

> The Commission might conclude that a particular set of offense and offender characteristics called for probation with a condition of

> psychiatric treatment, rather than imprisonment.

Id. at 173, *as reprinted in* 1984 U.S.C.C.A.N. at 3356.

Similarly,

> [o]ther health problems of the defendant might cause the Commission to conclude that in certain circumstances involving a particularly serious illness a defendant who might otherwise be sentenced to prison should be placed on probation. . . . Of course, the physical condition of the defendant would play an appropriate role in the determination of conditions of probation and the programs that would be made available to the defendant in prison, such as drug or alcohol treatment programs.

Id.

And finally, with regard to the need for drug treatment, the need that informed the trial judge's decision to increase Petitioner's prison sentence:

> Drug dependence, in the Committee's view, generally should not play a role in the decision whether or not to incarcerate the offender. In an unusual case, however, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison for 'drying out,' as a condition of probation.

Id.

Congress was equally clear in insisting that, though they might counsel a sentence of probation, educational, vocational, psychiatric, medical, or drug-treatment needs should not be considered in determining either to imprison or the length of any imprisonment:

> Subsection (e) specifically requires that the Sentencing Commission insure that the Sentencing Guidelines and Policy Statements reflect the "general inappropriateness" of considering education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant in recommending a term of imprisonment or the length of a term of imprisonment. . . .
>
> * * *
>
> The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.

Id. at 174-75, *as reprinted in* 1984 U.S.C.C.A.N. at 3357-58.

3. Congress revised §3582, eliminating a provision that would have allowed imposing a term of imprisonment for rehabilitation.

Finally, the evolution of what became §3582 confirms that this provision was intended to bar courts from imposing *or* lengthening a prison term for the

purpose of rehabilitation. As originally written, the provision would have allowed imprisonment for rehabilitative purposes in exceptional cases. But as Congress's views on the rehabilitative model hardened, that allowance was eliminated.

Legislation that would evolve into the Sentencing Reform Act first passed either house of Congress in the Senate as S. 1437. *See* Senate Report at 37, *as reprinted in* 1984 U.S.C.C.A.N. at 3220. That bill contained a general prohibition against rehabilitative imprisonment. This was contained in a directive to the United States Sentencing Commission in a provision that would become 28 U.S.C. §994(k):

> The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed education or vocational training, medical care, or other correctional treatment.

However, this general provision, as then written, set out an exception. It would not apply "in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact." S. 1437, 95th Cong. §124 (as reported by S. Comm. on the Judiciary, Nov. 15, 1977). Eventually, Congress abandoned this approach, doing away with all rehabilitative imprisonment. In the 96th Congress, the Senate Judiciary Committee again reported a bill that included sentencing reform. S. 1722, 96th Cong.

(as reported by S. Comm. on the Judiciary, Jan. 17, 1980).[34] This new bill eliminated the provision authorizing the use of coercive rehabilitation in exceptional cases, making the Sentencing Reform Act's ban on imprisonment for rehabilitative purposes complete. *See id.*, §125.

The entirety of the legislative history shows that Congress believed imprisonment did not rehabilitate offenders and that it had been used inappropriately to warehouse the poor and disadvantaged. In enacting the Sentencing Reform Act, Congress intended that prison be used to deter, to incapacitate, and to punish, not to rehabilitate. In crafting §3582, Congress intended to bar imposing or extending a term of imprisonment for rehabilitative purposes. In sum, there is nothing in the legislative history of the Act which conflicts with the statute's plain meaning.

II. If the Court Finds §3582(a) Ambiguous, the Rule of Lenity Applies to Prohibit Increased Incarceration to Promote Rehabilitation.

Petitioner maintains, along with the Third and D.C. Circuits, that the language of §3582(a) is clear and unambiguous in constraining the use of rehabilitation both as a basis to impose imprisonment and to lengthen the term of custody. *See* Parts I.A-D, *supra*. The legislative history of the Sentencing Reform Act

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[34] *See* Stith & Koh, *supra*, at 240 & n.108, for a discussion of this proposed legislation.

fully confirms that conclusion. *See* Part I.E, *supra*. Nonetheless, should the Court find that the statute is not clear, but is ambiguous as to the scope or function of the "recognizing" phrase, the Rule of Lenity requires the matter should still be decided as Petitioner and the Solicitor General urge.

"It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom penalties are sought to be imposed." 3 N. Singer & J. Singer, *Sutherland Statutes and Statutory Construction* §59:3 (7th ed. 2009) (footnotes omitted) (henceforth *Sutherland*). The Rule of Lenity has been applied by the Court as a corollary to the strict-interpretation rule. *See id.* §59:4 (citing *Staples v. United States*, 511 U.S. 600 (1994), and *Busic*, 446 U.S. 398). Indeed, its long and repeated application by the Court justifies its characterization as a "venerable rule" of construction. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion).[35]

"[W]hen a court is faced with two reasonable interpretations of a criminal statute and congressional

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[35] Since Chief Justice Marshall's first application of lenity in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820), the Court has had many occasions to discuss the role of lenity in construing ambiguous, penal statutes. *See, e.g., McBoyle v. United States*, 283 U.S. 25 (1931); *Ladner v. United States*, 358 U.S. 169 (1958); *United States v. Bass*, 404 U.S. 336 (1971); *Liparota v. United States*, 471 U.S. 419 (1985); *Crandon v. United States*, 494 U.S. 152 (1990); *Reno v. Koray*, 515 U.S. 50 (1995); *Holloway v. United States*, 526 U.S. 1 (1999); *Barber v. Thomas*, 130 S. Ct. 2499 (2010).

intent is ambiguous, the doctrine of lenity requires the court to adopt the less punitive alternative." *Sutherland* §59:4 (footnote omitted). "'[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.'" *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (quoting *Lewis v. United States*, 445 U.S. 55, 65 (1980)). "In past cases the Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Id.* The rule applies equally to statutes setting severity of punishment as to those defining substantive offenses, as the doctrine is "rooted in 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *R.L.C.*, 503 U.S. at 305 (plurality opinion) (quoting *Bass*, 404 U.S. at 348) (internal quotations omitted).

Here, the case law limiting the "recognizing" phrase in §3582(a) to only imposition, not length, of a prison term appears to be based on two types of potential ambiguity: a structural one and a lexical one. The first involves a question of the scope of the "recognizing" phrase: The *Duran* reasoning suggests that "recognizing" has narrow and selective semantic scope, encompassing only the first conjunct of the complex prepositional phrase, that is, the prepositional phrase referencing the initial imposition of imprisonment. *See* 37 F.3d at 561 ("[Section 3582(a)] admonishes the court to recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation. Once imprisonment is chosen as a punishment, however, §3582 does not prohibit consideration of

correction and rehabilitation in determining the length of imprisonment."). As discussed above, the more plausible and grammatically supported analysis of the "recognizing" phrase affords it wide scope, encompassing both conjuncts, the imposition *and* the length of imprisonment.

The potential lexical ambiguity identified in *Duran* involves the meaning of the word *imprisonment*: *Duran* takes it to mean only the imposition of incarceration. *See id.* ("If Congress had intended to prohibit sentencing judges from considering correction and rehabilitation in setting the length of the sentence, it could have enacted a statute that admonished judges to recognize 'that imprisonment *or the length of imprisonment* is not an appropriate means of promoting correction and rehabilitation.'"). However, as recognized in *Sealed Case*, a more common meaning is the "'fact or condition of being imprisoned.'" 573 F.3d at 850 (quoting the *Oxford English Dictionary*).

A third possible ambiguity, not discussed in the case law, is one involving the illocutionary force[36] of the "recognizing" clause, that is, whether the clause is intended to be directive or precatory. *Amicus curiae* may contend, regardless of the grammatical structure

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[36] Relating to "[a]n act such as ordering, warning, undertaking, performed in saying something." *Oxford English Dictionary*, *illocution*, http://www.oed.com/ (last visited Jan. 21, 2011). *See also* John L. Austin, *How to Do Things with Words* 98-109 (1962).

or the lexical nuances of individual words, that Congress may have intended the "recognizing" phrase to be a guideline, not a mandate, permitting sentencing courts to consider rehabilitation for imprisonment decisions, despite its express disfavor. However, as argued above, Part I.B, the directive nature of the "recognizing" language has never been questioned in the caselaw, and a precatory interpretation is inconsistent with the mandatory language used in the main clause.

In Petitioner's view, there is no ambiguity sufficient to trigger the application of the Rule to the provision at issue. The Court has emphasized that the ambiguity necessary to trigger the Rule of Lenity must be such that "[one] can make 'no more than a guess as to what Congress intended.'" *Koray*, 515 U.S. at 65 (quoting *Ladner*, 358 U.S. at 178); *see also Holloway*, 526 U.S. at 12 n.14. If the Court indeed can no more than guess whether Congress intended to: (1) follow the usual rules of grammar; (2) include the common meanings of the words used; and (3) continue its generally directive intent in the Sentencing Reform Act, by including *both* the imposition and length-of-imprisonment decisions within the scope of the "recognizing" clause, then, under the Rule of Lenity, the statute nonetheless must be construed in a defendant's favor to prohibit using rehabilitative reasons to increase incarceration. *See R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring in part and concurring in judgment) ("The more lenient interpretation must prevail."). The lenient construal is to prohibit extra prison time for rehabilitation, requiring instead

that treatment needs be addressed by non- or post-custodial sentencing options.

This makes sense in light of the policy considerations underlying the Rule of Lenity. The strict construction principle "is founded upon the public policy of protecting the interests of those against whom penalties are sought to be enforced." *Sutherland* §59:5. Consequently, where the meaning of applicable penal statutes is in doubt, "courts must weigh the interests of the individual against the interests of the public." *Id.* Here, the balance of interests starkly supports Petitioner's interpretation. That is because she has a strong liberty interest in avoiding an illegal sentence resulting in excessive imprisonment. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). On the other hand, as reflected in Congress's express findings regarding the non-correlation between prison and rehabilitation, *see* Part I.E, *supra*, there is *no* public interest in imprisoning someone for more time than is otherwise appropriate to punish, deter, or incapacitate, solely on a discredited and ineffectual theory of rehabilitation. The lack of a public interest is particularly striking here, where the hoped-for enrollment in the RDAP program will not even take place, *see supra*, at 43-44, and so the excessive prison time imposed by the district court benefits no one. Moreover, any genuine public interest in Petitioner's rehabilitation can – and should properly – be addressed by

the conditions of supervised release, following the punitive portion of the sentence served in prison.

The application of the Rule of Lenity is particularly appropriate here. Even if there is reasonable ambiguity about the proper scope, word choice, or intended force in the drafting of §3582(a), the Rule of Lenity requires the Court effect the will of Congress by prohibiting imposition of prison terms for rehabilitative purposes.

CONCLUSION

Petitioner's sentence should be reversed and her case remanded for resentencing.

Respectfully submitted,

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18 U.S.C. § 3551. Authorized sentences

(a) In general. – Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals. – An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to –

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

* * *

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

* * *

---

18 U.S.C. § 3582. Imposition of a sentence of imprisonment

(a) Factors to be considered in imposing a term of imprisonment. – The court, in determining

whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

* * *

---

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

* * *

(b) The purposes of the United States Sentencing Commission are to –

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar

records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

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28 U.S.C. § 994. Duties of the Commission

* * *

(b)

(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that

range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

* * *

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance –

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

* * *

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

* * *

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that,

as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

RESPONDENT'S BRIEF

No. 10-5400

In the Supreme Court of the United States

ALEJANDRA TAPIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES SUPPORTING VACATUR

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QUESTION PRESENTED

Whether 18 U.S.C. 3582(a) precludes a district court from imposing a longer term of imprisonment in order to promote a defendant's rehabilitation.

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BRIEF FOR THE UNITED STATES SUPPORTING VACATUR

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted in 376 Fed. Appx. 707.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2010. The petition for a writ of certiorari was filed on July 9, 2010, and the petition was granted on December 10, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-20a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of bringing an unauthorized alien into the United States for financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii); bringing an unauthorized alien into the United States without presentation, in violation of 8 U.S.C. 1324(a)(2)(B)(iii); and failing to appear before a court as required by the conditions of release, in violation of 18 U.S.C. 3146. Pet. App. A1-A2. The district court sentenced her to 51 months of imprisonment, to be followed by three years of supervised release. *Id.* at A2; 4/30/2009 Sent. Tr. 20-21 (Sent. Tr.). The court of appeals affirmed her sentence. Pet. App. A1-A2.

1. The Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.* and 28 U.S.C. 991 *et seq.*, provides a comprehensive criminal sentencing law for the federal system. In 18 U.S.C. 3553(a), the SRA sets out factors that a district court must consider when fashioning a defendant's overall sentence. Among other things, the court must consider the need for the sentence imposed:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (B) to afford adequate deterrence to criminal conduct;
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> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. 3553(a)(2).

Other provisions of the SRA give more specific guidance on how the Section 3553(a) factors apply in the context of the various sentencing options, which include not only imprisonment but also probation, fines, and supervised release. Thus, 18 U.S.C. 3562(a) addresses how the factors apply when the court is imposing probation; 18 U.S.C. 3572(a) addresses how they apply when the court is imposing a fine; 18 U.S.C. 3583 (2006 & Supp. III 2009) addresses how they apply when the court is imposing or revoking supervised release; and 18 U.S.C. 3582(a) addresses how the factors apply when the court is imposing a term of imprisonment.

Section 3582(a) provides:

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

18 U.S.C. 3582(a).[1]

The SRA also provides for the promulgation by the United States Sentencing Commission of federal Sentencing Guidelines for district courts to use in determining the appropriate sentence. 28 U.S.C. 994(a)(1). The SRA includes a variety of instructions to the Sentencing Commission on the content of the Guidelines. Among

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[1] Section 3582(a) also provides that "[i]n determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(a).

other things, the SRA directs the Commission to ensure that the Guidelines restrict the use of imprisonment to promote a defendant's rehabilitation. 28 U.S.C. 994(k). Specifically, Section 994(k) provides:

> The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

Ibid.

2. On January 14, 2008, petitioner and an accomplice, Tinamarie Debenedetto, were arrested at the border crossing in San Ysidro, California, when they attempted to smuggle two illegal aliens into the United States. 12/16/2008 Tr. 510, 538-551, 637-639; 12/17/2008 Tr. 681, 698-699. The day before, petitioner and Debenedetto had traveled from Los Angeles, California, to Tijuana, Mexico, where they checked into a hotel. *Id.* at 681-683. On the morning of January 14th, they met with their "boss" to discuss "payment arrangements" for the alien smuggling. *Id.* at 689. Later that day, they were driven to a house where a jeep for transporting the aliens was located. *Id.* at 689-691. The jeep had been re-engineered to operate on an alternative fuel source, so that people could be secreted in the gas tank compartment. 12/16/2008 Tr. 610, 614, 623. Petitioner helped fit the two aliens into the hidden compartment. 12/17/2008 Tr. 691-692. Debenedetto then drove the jeep, with petitioner in the passenger seat, to the border crossing. *Id.* at 692; Presentence Investigation Report (PSR) 1. A border officer smelled a strong odor of gasoline emanating from the jeep. 12/16/2008 Tr. 538-543.

Upon further inspection, border authorities discovered the two illegal aliens jammed into the modified gas tank compartment. *Id.* at 546-551, 605-608.

On January 30, 2008, petitioner and Debenedetto were indicted by a grand jury sitting in the United States District Court for the Southern District of California on one count of bringing an unauthorized alien into the United States for financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii); and one count of bringing an unauthorized alien into the United States without presentation, in violation of 8 U.S.C. 1324(a)(2)(B)(iii). Indictment 1-2.

While petitioner was released on bond pending further proceedings, she fled, and a bench warrant was issued for her arrest. 12/17/2008 Tr. 863-865; PSR 2. She was apprehended six months later, in possession of paraphernalia for using methamphetamine, a sawed-off shotgun, and mail belonging to other persons, which petitioner admitted she intended to use to commit identity theft. 12/16/2008 Tr. 587-593, 597; Sent. Tr. 19; Gov't Mot. for Upward Adjustment and Upward Departure 5; PSR 4-5.

On November 25, 2008, the government filed a superseding indictment that added a third count charging petitioner with failing to appear before a court as required by the conditions of her release, in violation of 18 U.S.C. 3146. Superseding Indictment 1-3. A jury subsequently found petitioner guilty of all three charges. Judgment 1.

3. At petitioner's sentencing hearing on April 30, 2009, the district court, following the recommendations in the PSR, grouped the three counts of conviction and assigned petitioner a base offense level of 12 under Sentencing Guidelines § 2L1.1(a)(2). Sent. Tr. 12; PSR 11.

The court imposed a six-level enhancement because petitioner's offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury, Guidelines § 2L1.1(b)(6), and a two-level enhancement for obstruction of justice, Guidelines §§ 2J1.6, comment. (n.3), 3C1.1. Sent. Tr. 12-13; PSR 11. The enhancements yielded a total offense level of 20. PSR 12. Petitioner had three prior criminal convictions, which generated six criminal history points and placed her in criminal history category III. PSR 4-5. Petitioner's recommended sentencing range under the Guidelines was 41 to 51 months of imprisonment. PSR 12. The district court sentenced her to a total term of 51 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 20-21.

The district court justified the sentence under the general sentencing criteria in 18 U.S.C. 3553(a). Sent. Tr. 16-20. Regarding petitioner's history and characteristics, the court acknowledged that petitioner had a history of sexual and physical abuse. *Id.* at 16-17. The court observed, however, that she had failed to get help when it was available and had instead associated with the wrong people and become involved in alien smuggling. *Ibid.* The court further noted that petitioner had jumped bail after she was arrested and "engaged in a lot more serious activity" while she was a fugitive, including using methamphetamine, possessing a sawed-off shotgun, and taking steps to commit identity theft. *Id.* at 17-18. Regarding the nature and circumstances of the offense of conviction, the court stressed that smuggling aliens was "serious," *id.* at 18, that petitioner committed the offense in a way that "created a substantial risk of death or serious bodily injury," *id.* at 17, and that "a sufficient sentence has to be imposed for that," *id.* at 18.

The district court emphasized that "the sentence has to deter criminal conduct by others, and it has to protect the public from further crimes" by petitioner. Sent. Tr. 18. The court stated that those concerns were "a big factor here," *ibid.*, noting that this offense was "not [petitioner's] first felony conviction" and emphasizing that petitioner's criminal conduct while a fugitive was "of serious concern to the court," *id.* at 17-18. See *id.* at 18 (stating that this conduct was "really, really of concern to the court"); *id.* at 19 (reiterating that "the fact that she was launching into a new criminal career while she was a fugitive really is of concern to the court and that's something that motivates imposing a sentence that in total is at the high end of the guideline range").

The district court also stated that "one of the factors" affecting the length of imprisonment was that the sentence be "sufficient to provide needed correctional treatment." Sent. Tr. 18-19. For that reason, the court explained, it wanted petitioner to be imprisoned "long enough to get the 500 Hour Drug Program" administered by the Bureau of Prisons (BOP). *Id.* at 19.[2]

The district court also noted that the sentence had to be sufficient but not greater than necessary to achieve the purposes of sentencing. Sent. Tr. 18-19. The court stated that "a sentence less than what I am imposing would not deter her and provide for sufficient time so she could begin to address these problems," and that the sentence it was imposing was "necessary * * * for all the reasons" previously stated. *Id.* at 20.

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[2] The court noted that it would "strongly recommend[]" to the BOP that petitioner serve her sentence at FCI Dublin/Pleasanton and that she participate in the 500 Hour Drug Program at that institution. Sent. Tr. 20-21.

After announcing the sentence, the district court asked petitioner's counsel whether she had any objections. Sent. Tr. 23. Counsel stated that she had none. *Id.* at 24.

4. The court of appeals affirmed petitioner's sentence in an unpublished memorandum opinion. Pet. App. A1-A2.

The court explained that petitioner argued on appeal that "the district court committed plain error by basing her 51-month sentence on speculation about whether and when [she] could enter and complete the Bureau of Prison's 500-hour drug abuse treatment program." Pet. App. A2. As part of that claim, petitioner argued, for the first time, that 18 U.S.C. 3582(a) precludes a district court from lengthening a term of imprisonment to promote a defendant's rehabilitation. Pet. C.A. Br. 18-23. Petitioner acknowledged that the court of appeals had previously rejected that argument in *United States* v. *Duran*, 37 F.3d 557 (9th Cir. 1994), but petitioner contended that *Duran* had been incorrectly decided, noting that its analysis had been rejected by at least two other circuits. Pet. C.A. Br. 18-23 (citing *In re Sealed Case*, 573 F.3d 844 (D.C. Cir. 2009), and *United States* v. *Manzella*, 475 F.3d 152 (3d Cir. 2007)).

The court of appeals held that the district court had committed "[n]o reversible error." Pet. App. A2. In support, the court of appeals cited *Duran*, which had held that, although Section 3582(a) prohibits a sentencing court from considering rehabilitation in determining whether to impose a term of imprisonment in the first instance, the statute allows a court to rely on rehabilitation to increase the length of a term imposed for other reasons. *Duran*, 37 F.3d at 561. The *Duran* court reasoned that "Section 3582 distinguishes between the de-

terminations of whether to impose a term of imprisonment and of the actual length of the imprisonment" and "admonishes the court to recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation." *Ibid.* "If Congress had intended to prohibit sentencing judges from considering correction and rehabilitation in setting the length of the sentence," the court stated, "it could have enacted a statute that admonished judges to recognize 'that imprisonment *or the length of imprisonment* is not an appropriate means of promoting correction and rehabilitation.'" *Ibid.* The *Duran* court further reasoned that limiting Section 3582(a)'s prohibition to the determination whether to impose a term of imprisonment in the first instance harmonizes Section 3582(a) with Section 3553(a), which "includes 'correctional treatment' as a factor to be considered" at sentencing. *Ibid.*

SUMMARY OF ARGUMENT

The SRA "rejects imprisonment as a means of promoting rehabilitation." *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989). To that end, 18 U.S.C. 3582(a) states that a district "court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the [general sentencing] factors set forth in [18 U.S.C.] 3553(a) to the extent they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." Section 3582(a) categorically prohibits a sentencing court from either imposing or lengthening a term of imprisonment in order to rehabilitate the defendant.

A. Section 3582(a)'s text makes clear that its restriction on the consideration of rehabilitation applies both

when a court decides whether to impose a term of imprisonment and when the court decides how long a term to impose. The statute expressly states that a sentencing court must "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation" both "in determining whether to impose a term of imprisonment" and, "if a term of imprisonment is to be imposed, in determining the length of the term." 18 U.S.C. 3582(a). The statutory text also makes clear that Section 3582(a)'s prohibition on using rehabilitation to justify imprisonment is categorical. Whenever a sentencing court imposes a term of imprisonment, or increases the length of the term, in order to facilitate the defendant's rehabilitation, the court fails to "recogniz[e]" that imprisonment is not an "appropriate" means of promoting rehabilitation.

B. The statutory context supports giving Section 3582(a) its natural meaning. Another provision of the SRA directs the United States Sentencing Commission to "insure" that the Sentencing Guidelines "reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 U.S.C. 994(k). Congress intended Sections 994(k) and 3582(a) to work in tandem to implement its determination that "imprisonment is not an appropriate means of promoting correction and rehabilitation." S. Rep. No. 225, 98th Cong., 1st Sess. 76 (1983) (Senate Report). Other portions of Section 994 make clear that the restriction in Sections 994(k) and 3582(a) is categorical. Unlike Section 994(k), several other subsections instruct the Commission to ensure only that the guidelines reflect the "general" inappropri-

ateness of considering specified factors at sentencing. By omitting the qualifier "general" from Sections 994(k) and 3582(a), Congress signaled that those provisions are a flat bar, rather than non-binding "general" guidance.

Interpreting Section 3582(a) as a categorical bar on imposing or lengthening a term of imprisonment to promote a defendant's rehabilitation is also consistent with 18 U.S.C. 3553(a)(2)(D). That provision directs courts to consider a defendant's rehabilitative needs in determining the overall sentence, which can include other sanctions, such as probation and supervised release, in lieu of or in addition to imprisonment. 18 U.S.C. 3551(b). The provisions governing non-incarcerative sentencing options permit, and sometimes require, consideration of rehabilitation. *E.g.*, 18 U.S.C. 3562, 3563 (2006 & Supp. III 2009), 3583 (2006 & Supp. III 2009). Section 3582(a), however, prohibits courts from relying on a defendant's rehabilitative needs in deciding to impose or lengthen a term of imprisonment.

C. Construing Section 3582(a) as prohibiting courts from relying on rehabilitation to justify either imposing a term of imprisonment at all or lengthening the term imposed best advances the SRA's goal of eliminating rehabilitation as a purpose of imprisonment. Moreover, the practice of tying a defendant's release date from prison to a determination that the defendant had been rehabilitated was a central component of the sentencing system that Congress rejected in enacting the SRA. Interpreting Section 3582(a) to bar sentencing courts from imposing or lengthening a term of imprisonment to facilitate a defendant's rehabilitation also makes sense because a court cannot guarantee that a defendant will actually be able to participate in a rehabilitative program. Although sentencing judges can recommend that

defendants be placed in particular facilities or programs, the BOP has sole discretion to make placement decisions.

D. The legislative history of the SRA and the evolution of the congressional bills that culminated in the SRA's enactment confirm that Section 3582(a) imposes a categorical bar on using rehabilitation to justify imposing or lengthening a term of imprisonment. Congress considered legislation that would have allowed courts to rely on rehabilitation as a justification for a term of imprisonment in the exceptional case, but Congress chose to enact statutory language that eliminated that exception. And the committee reports accompanying the evolving legislation consistently stated that the restrictions on relying on rehabilitation applied both to decisions whether to impose a term of imprisonment and to decisions about how long a term to impose.

E. Although no court of appeals has interpreted Section 3582(a)'s directive against using rehabilitation to justify imprisonment as anything less than a categorical ban, some circuits have concluded that the prohibition applies only to a court's determination whether to impose a term of imprisonment in the first instance. The reasoning of those courts is not persuasive. They have read the word "imprisonment" to encompass only initial placement in prison and not continued incarceration. Both dictionary definitions and context, however, make clear that "imprisonment" includes both the "action of imprisoning" and the "condition of being imprisoned." *In re Sealed Case*, 573 F.3d 844, 850 (D.C. Cir. 2009) (quoting 7 *Oxford English Dictionary* 746 (2d ed. 1989) (*OED*)). The courts have also relied on the absence of the phrase "the length of imprisonment" from the directive that courts "recogniz[e] that imprisonment is not an

appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a). But including that phrase was unnecessary given the statute's explicit statement that the directive applies "in determining the length of the term" of imprisonment. *Ibid.* Finally, the courts have relied on a perceived conflict between the broader reading of Section 3582(a) and Section 3553(a)(2)(D), as well as an isolated statement in the legislative history. Sections 3582(a) and 3553(a)(2)(D) do not conflict, however, and the legislative and drafting history, in their entirety, confirm that Section 3582(a)'s prohibition on considering rehabilitation applies with equal force to a court's decision whether to impose a term of imprisonment and its decision about how long a term to impose.

ARGUMENT

SECTION 3582(a) PRECLUDES A DISTRICT COURT FROM IMPOSING OR LENGTHENING A TERM OF IMPRISONMENT TO PROMOTE A DEFENDANT'S REHABILITATION

In the SRA, Congress enacted "sweeping reforms" of the federal criminal sentencing system. *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). Congress abandoned the prior system of indeterminate sentencing and parole, which was based on the theory that rehabilitation is the primary goal of sentencing and that defendants should be kept in prison until they have been rehabilitated. *Id.* at 363-368; Senate Report 38, 40. Concluding that "this model of 'coercive' rehabilitation" had not only "failed" but also caused widespread and unjustified sentencing disparities, Congress enacted a determinate sentencing system in which rehabilitation played a much more limited role. *Id.* at 40; see *id.* at 40-50; *Mistretta*, 488 U.S. at 366-368.

Although rehabilitation remains a purpose of sentencing, 18 U.S.C. 3553(a)(2)(D), which encompasses a range of components other than imprisonment, 18 U.S.C. 3551(b), the SRA "rejects imprisonment as a means of promoting rehabilitation." *Mistretta*, 488 U.S. at 367 (emphasis added). To that end, the SRA requires a sentencing court, "in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term," to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a). The courts of appeals agree that Section 3582(a) prohibits sentencing courts from imposing a term of imprisonment, rather than some other form of sentence, in order to promote a defendant's rehabilitation. The circuits disagree, however, on whether Section 3582(a) also prohibits a court that has decided to impose a term of imprisonment for other reasons from increasing the term to promote rehabilitation.[3]

[3] Compare *In re Sealed Case*, 573 F.3d 844, 849-851 (D.C. Cir. 2009) (Section 3582(a) prohibits both imposing and lengthening a term of imprisonment to promote rehabilitation.), and *United States* v. *Manzella*, 475 F.3d 152, 157-161 (3d Cir. 2007) (same), with *United States* v. *Jimenez*, 605 F.3d 415, 424-425 (6th Cir. 2010) (Section 3582(a) prohibits only imposing a prison term for that purpose, not lengthening the term.); *United States* v. *Hawk Wing*, 433 F.3d 622, 629-630 (8th Cir. 2006) (same); and *United States* v. *Duran*, 37 F.3d 557, 561 (9th Cir. 1994) (same). See *United States* v. *Higdon*, 531 F.3d 561, 564 (7th Cir. 2008) (suggesting that Section 3582(a) precludes lengthening a prison term to promote rehabilitation); *United States* v. *Anderson*, 15 F.3d 278, 280-281 (2d Cir. 1994) (endorsing that interpretation of Section 3582(a), but explaining that it does not apply to the revocation of supervised release); see also *United States* v. *Giddings*, 37 F.3d 1091, 1094 (5th Cir. 1994) (endorsing the contrary interpretation of Section 3582(a)

In this case, the Ninth Circuit, following its earlier decision in *United States* v. *Duran*, 37 F.3d 557 (1994), held that Section 3582(a) permits a district court to increase a defendant's term of imprisonment in order to promote the defendant's rehabilitation. Pet. App. A1-A2. The Ninth Circuit's holding is incorrect. The statutory text, related provisions of the SRA, the statute's purposes, and the legislative and drafting history all indicate that Section 3582(a) prohibits a district court both from imposing and from lengthening a term of imprisonment in order to rehabilitate the defendant.

A. The Plain Text Of Section 3582(a) Precludes A District Court From Either Imposing Or Lengthening A Term Of Imprisonment In Order To Rehabilitate The Defendant

1. Under the SRA, a district court has a range of options when sentencing a defendant following his or her conviction for a crime. The court may impose a term of imprisonment, a term of probation, or a fine. 18 U.S.C. 3551(b). The court may impose a fine in addition to any other sanction, and the court may order restitution, forfeiture, or notification of victims. *Ibid.*; 18 U.S.C. 3554, 3555, 3556. If the court imposes a term of imprisonment, the court may also require that the defendant serve a term of supervised release after completing the prison term. 18 U.S.C. 3583(a).

In determining an appropriate sentence, the court must consider the general sentencing criteria in 18 U.S.C. 3553(a), including the need for the sentence imposed:

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in a case involving revocation of supervised release), cert. denied, 514 U.S. 1008 (1995).

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (B) to afford adequate deterrence to criminal conduct;
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> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. 3553(a)(2). These four considerations—"just deserts," deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing, and the court must impose sentence "so as to achieve the[se] purposes * * * to the extent they are applicable in light of all the circumstances of the case." 18 U.S.C. 3551(a).[4]

In imposing "a term of imprisonment," however, the court must also comply with Section 3582(a), which restricts the court's reliance on the purpose of rehabilitation. Section 3582(a) states that "[t]he court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropri-

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[4] The other factors that Section 3553(a) requires sentencing courts to consider are: the nature and circumstances of the offense and the history and characteristics of the defendant, 18 U.S.C. 3553(a)(1); the kinds of sentences available, 18 U.S.C. 3553(a)(3); the Sentencing Guidelines, 18 U.S.C. 3553(a)(4) and (5); the need to avoid unwarranted sentence disparities, 18 U.S.C. 3553(a)(6); and the need to provide restitution, 18 U.S.C. 3553(a)(7).

ate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a).

By its express terms, Section 3582(a)'s restriction on the consideration of rehabilitation applies to both the sentencing court's decision whether to impose a term of imprisonment at all and its decision about how long a term to impose. Under standard rules of grammar and statutory construction, the qualifying phrase "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" modifies the preceding phrase "shall consider the factors set forth in section 3553(a) to the extent that they are applicable." See Norman J. Singer, *Statutes and Statutory Construction* § 47:33, at 371 (6th ed. 2000) (explaining that "a proviso usually is construed to apply to the provision or clause immediately preceding it"); William Strunk, Jr. and E.B. White, *The Elements of Style* 30 (4th ed. 2000) (noting that modifiers are placed next to the words they modify). The statute explicitly requires that the court consider the Section 3553(a) factors both "in determining whether to impose a term of imprisonment" *and* "in determining the length of the term." 18 U.S.C. 3582(a). The directive that the court "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation" therefore also necessarily applies both when the court decides whether to impose a term of imprisonment and when the court decides how long a term to impose. See *In re Sealed Case*, 573 F.3d 844, 849 (D.C. Cir. 2009).

The directive's use of the word "imprisonment" confirms that it limits both the decision whether to impose a term of imprisonment and the decision about how long the term should last. "Imprisonment" includes not only "the act of imprisoning" but also "the state of being im-

prisoned." *Webster's Third New International Dictionary* 1137 (1993) (*Webster's Third*); see *In re Sealed Case*, 573 F.3d at 850 (explaining that "'imprisonment' means '[t]he action of imprisoning, *or* [the] fact or condition of being imprisoned'") (quoting *OED* 746). Thus, the statute requires a sentencing court to recognize that neither placing nor keeping someone in the status of imprisonment is an appropriate means of promoting rehabilitation. As the D.C. Circuit has explained, "[a] sentencing court deciding to keep a defendant locked up for an additional month is, as to that month, in fact choosing imprisonment over release. If the sentencing court adds the extra month to make a defendant eligible for a prison drug treatment or educational program, it fails to recognize that 'imprisonment' is not an appropriate means of promoting rehabilitation." *Ibid.*

2. Section 3582(a)'s restriction on using rehabilitation to justify imprisonment is a categorical prohibition, not merely an advisory recommendation. Section 3582(a) directs the sentencing court to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a). The word "recognize" means "to admit the fact, truth, or validity of." *Webster's Third* 1896; accord *The Random House Dictionary of the English Language* 1611 (2d ed. 1987) (*Random House*) (defining "recognize" as "to acknowledge or treat as valid"). The word "appropriate" means "suitable or fitting for a particular purpose." *Random House* 103; accord *Webster's Third* 106 (defining "appropriate" as "specifically suitable"). Whenever a sentencing court imposes a term of imprisonment or increases the length of the term for the purpose of rehabilitating the defendant, the court fails "to acknowledge

or treat as valid" that imprisonment is not a "suitable or fitting" means of promoting rehabilitation.

Consistent with that reasoning, the courts of appeals have uniformly construed the prohibition imposed by Section 3582(a) as a categorical one. See *United States* v. *Jimenez*, 605 F.3d 415, 424 (6th Cir. 2010) (explaining that the court has "construed § 3582(a) as barring the sentencing court from choosing prison, rather than a non-incarceration sentence, to promote rehabilitation"); *In re Sealed Case*, 573 F.3d at 846 (stating that Section 3582(a) "expressly prohibits sentencing courts from treating rehabilitation as a reason for imposing a longer term of imprisonment"); *United States* v. *Manzella*, 475 F.3d 152, 160-161 (3d Cir. 2007) (holding that Section 3582(a) provides that a "defendant not be sent to prison or held there for a specific length of time for the sole purpose of rehabilitation"); *United States* v. *Hawk Wing*, 433 F.3d 622, 629-630 (8th Cir. 2006) ("For purposes of initial sentencing, a court may not consider rehabilitative goals in considering whether to impose a sentence of imprisonment.") (citation omitted); *United States* v. *Giddings*, 37 F.3d 1091, 1096 (5th Cir. 1994) (referring to "the prohibition against considering rehabilitative needs"), cert. denied, 514 U.S. 1008 (1995); *Duran*, 37 F.3d at 561 (referring to "the prohibition in § 3582"); *United States* v. *Anderson*, 15 F.3d 278, 280-281 (2d Cir. 1994) (stating that, under Section 3582(a), "a court may not 'imprison[] as a means of promoting rehabilitation' or serving medical needs") (quoting *Mistretta*, 488 U.S. at 367).

Section 3582(a)'s categorical prohibition applies with equal force to prevent a court from relying on rehabilitation both in imposing a term of imprisonment and in imposing a longer term than the court would otherwise

have imposed. When a court would not have imposed a term of imprisonment of any length, or would have imposed a shorter term, except for its desire to promote the defendant's rehabilitation, the court, in imposing the term if has selected, fails to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a). Thus, a court may not impose a longer term of imprisonment because it believes that the defendant will benefit from participating in prison rehabilitation programs over a longer period of time, *e.g.*, *In re Sealed Case*, 573 F.3d at 851, or because it wants to enable the defendant to participate in a particular rehabilitative program, *e.g.*, *Manzella*, 475 F.3d at 161.

B. The Statutory Context Supports Giving Section 3582(a) Its Natural Meaning

Construing Section 3582(a), in accordance with its natural meaning, to preclude sentencing courts from relying on a defendant's need for rehabilitation to justify either imposing or lengthening a term of imprisonment is consistent with and reinforced by other sentencing provisions in the SRA, including 28 U.S.C. 994 and 18 U.S.C. 3553(a)(2)(D).

1. a. Section 994 directs the Sentencing Commission to promulgate the Sentencing Guidelines, which inform the sentencing determinations of the federal district courts. 28 U.S.C. 994(a). As enacted, the SRA made the Guidelines binding on the district courts, which were required to impose sentences of the kind and within the range mandated by the Guidelines except in limited circumstances. See *United States* v. *Booker*, 543 U.S. 220, 233-235 (2005). Although *Booker* held that the mandatory Guidelines system violated the Sixth Amendment,

and it remedied that violation by rendering the Guidelines advisory only, the Guidelines continue to provide important guidance for district court sentencing decisions. See *id.* at 259-260, 264.

Subsection (k) of Section 994 directs the Sentencing Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 U.S.C. 994(k). As *Mistretta* recognized, this language categorically "rejects imprisonment as a means of promoting rehabilitation." 488 U.S. at 367; see *United States* v. *Harris*, 990 F.2d 594, 596 (11th Cir. 1993) (interpreting Section 994(k) as a "prohibition" on imprisoning or extending the term of imprisonment); *United States* v. *Mogel*, 956 F.2d 1555, 1563 (11th Cir.) (citing Section 994(k) for the proposition that "[r]ehabilitative considerations have been declared irrelevant for purposes of deciding whether or not to impose a prison sentence and, if so, what prison sentence to impose"), cert. denied, 506 U.S. 857 (1992).

Section 994(k) sheds lights on the meaning of Section 3582(a) because Congress intended the two provisions to work in tandem to implement its determination that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Senate Report 76. Section 994(k) prohibits the Sentencing Commission from recommending a term of imprisonment or a longer term based on a defendant's rehabilitative needs. Section 3582(a) prohibits district courts from imposing or lengthening a defendant's term of imprisonment when selecting a sentence from within the Guidelines range or when sentencing outside the range.

b. The other subsections of Section 994 reinforce the conclusion that Sections 994(k) and 3582(a) impose a categorical bar on using imprisonment to promote a defendant's rehabilitation. Some of the subsections (including Section 994(k)) instruct the Commission to ensure that the guidelines reflect the "appropriateness" or the "inappropriateness" of considering certain factors for specified purposes at sentencing. See, *e.g.*, 18 U.S.C. 994(*l*)(1) (requiring the Commission to ensure that the Guidelines reflect "the appropriateness of imposing an incremental penalty for each offense" when the defendant has committed "multiple offenses" at different times, including when the subsequent offense is for failure to appear, in violation of 18 U.S.C. 3146). In contrast, other subsections instruct the Commission to ensure only that the guidelines reflect the "general appropriateness" or the "general inappropriateness" of considering certain other factors. See, *e.g.*, 28 U.S.C. 994(e) (requiring the Commission to ensure that the Guidelines, "in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant"); 28 U.S.C. 994(*l*)(2) (requiring the Commission to ensure that the Guidelines reflect "the general inappropriateness" of imposing consecutive terms for conspiracy or solicitation and for the offense that was the object of the conspiracy or solicitation).

As several courts of appeals have recognized, Congress used the term "general" when it was not imposing an absolute rule about whether a particular factor could be considered but instead was merely providing guidance on how it envisioned the factor should ordinarily be

treated. See, *e.g.*, *United States* v. *Kapaev*, 199 F.3d 596, 599 (2d Cir. 1999) (holding that Section 994(*l*)(2) does not "prohibit all consecutive sentences for conspiracy and the substantive crime that was the object of the conspiracy"), cert. denied, 529 U.S. 1081 (2000); *United States* v. *Saccoccia*, 58 F.3d 754, 787 (1st Cir. 1995) (same), cert. denied, 517 U.S. 1105 (1996); *Mogel*, 956 F.2d at 1562 (declining to interpret Section 994(e) as "categorically prohibiting" consideration of the listed offender characteristics).

Notably, Congress omitted the term "general" from Section 994 and the parallel prohibition in Section 3582(a). The omission of that qualifier strongly indicates that Congress intended those provisions as an absolute prohibition, rather than non-binding, "general" guidance. See *Kucana* v. *Holder*, 130 S. Ct. 827, 838 (2010) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Nken* v. *Holder*, 129 S. Ct. 1749, 1759 (2009) (internal quotation marks omitted)).

2. Interpreting Section 3582(a) as a categorical bar on imposing or lengthening a term of imprisonment to promote a defendant's rehabilitation is also consistent with the other sentencing provisions of the SRA, including Section 3553(a)(2)(D). That provision directs a sentencing court to consider "the need for the sentence imposed * * * to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. 3553(a)(2)(D). It requires the court generally to consider rehabilitative purposes in fashioning a defendant's *sentence*, while Section 3582(a) specifically pro-

hibits the court from relying on rehabilitation as a justification for imposing or lengthening a defendant's term of *imprisonment*.

As described above, a defendant's sentence need not include imprisonment or imprisonment alone, but can include other components, such as probation, supervised release, a fine, and restitution. See p. 15, *supra*; *In re Sealed Case*, 573 F.3d at 851; *Manzella*, 475 F.3d at 158; *United States* v. *Maier*, 975 F.2d 944, 946-947 (2d Cir. 1992). Section 3553(a)(2)(D), like the rest of Section 3553(a), provides general guidance for a district court in determining that overall sentence. Other statutory provisions provide more specific guidance on how the Section 3553(a) factors apply to each of the available sentencing options. See, *e.g.*, 18 U.S.C. 3562(a) (probation); 18 U.S.C. 3572(a) (fines); 18 U.S.C. 3583(c) (supervised release).

For example, Section 3562(a) provides that, "in determining whether to impose a term of probation," and "in determining the length of the term," the court shall consider the Section 3553(a) factors "to the extent that they are applicable." 18 U.S.C. 3562(a). Section 3572(a) provides that, in determining whether to impose a fine, and in determining the amount of any fine and the repayment method and schedule, the court must consider not only the factors in Section 3553(a) but also additional considerations, such as the defendant's income, earning capacity, and financial resources. 18 U.S.C. 3572(a). And Section 3583(c) expressly requires a sentencing court to consider the need to promote the defendant's rehabilitation, in addition to a specified subset of other Section 3553(a) factors, in deciding whether to impose a

term of supervised release and how long a term to impose. 18 U.S.C. 3583(c).[5]

Together with these provisions, Section 3553(a)(2)(D) makes clear that "the purpose of rehabilitation is still important in determining whether a sentence other than a term of imprisonment is appropriate in a particular case." Senate Report 76-77. Thus, when the principal goal of a particular sentence is rehabilitation, a court may, to the extent permitted by the statutory sentencing range, elect to impose probation rather than imprisonment. *Id.* at 91-92. Or supervised release may be used "to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release." *Id.* at 124. And rehabilitative conditions may be placed on terms of probation or supervised release. *Id.* at 76, 124; 18 U.S.C. 3563(a)(4) and (b)(9), 3583(d) (Supp. III 2009); see *United States* v. *Watson*, 482 F.3d 269, 276 (3d Cir. 2007); *Harris*, 990 F.2d at 596. For example, a court may require a defen-

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[5] A court is also required to consider a defendant's rehabilitative needs when the defendant has violated a condition of supervised release and the court is deciding whether to revoke the supervised release and to require the defendant to spend time in prison instead. 18 U.S.C. 3583(e)(3). Courts of appeals have concluded that Section 3582(a) is not applicable in that circumstance because the court is not imposing "a term of imprisonment," 18 U.S.C. 3582(a), but is instead "requir[ing] the defendant to serve in prison all or part of the *term of supervised release*," 18 U.S.C. 3583(e)(3) (emphasis added). See *United States* v. *Tsosie*, 376 F.3d 1210, 1216 (10th Cir. 2004), cert. denied, 543 U.S. 1155 (2005); see also *id.* at 1214 (noting that the circuits uniformly agree that courts may rely on rehabilitative interests when requiring a defendant to serve time in prison upon revocation of supervised release); accord *United States* v. *Doe*, 617 F.3d 766, 771-774 (3d Cir. 2010), petition for cert. pending, No. 10-7592 (filed Nov. 15, 2010).

dant sentenced to a term of probation or supervised release to participate in a residential drug treatment program. See 18 U.S.C. 3563(b)(9) and (11), 3583(d) (Supp. III 2009).

Moreover, when a court determines to impose a term of imprisonment and sets the length of the term based on other valid penological purposes, such as "just deserts," deterrence, or incapacitation, Section 3582(a) does not preclude the court from discussing rehabilitation. Thus, the court can express its hope that the defendant will receive treatment while incarcerated or note that an otherwise validly imposed term of imprisonment will provide the collateral benefit that the defendant will receive treatment. See *Jimenez*, 605 F.3d at 424; *Watson*, 482 F.3d at 275; *United States* v. *Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005). The court can also take rehabilitation into account in recommending that the defendant be placed in a particular facility or type of facility or that she participate in a particular program. 18 U.S.C. 3582(a) (requiring court, in recommending a particular type of facility, to consider any policy statements issued by the Sentencing Commission); 28 C.F.R. 550.51(b)(1)(iii) (stating that the BOP will consider sentencing courts' recommendations in determining priority for placing prisoners in drug and alcohol education courses); see *United States* v. *Hoffa*, 587 F.3d 610, 615 (3d Cir. 2009); *United States* v. *Jackson*, 70 F.3d 874, 878 (6th Cir. 1995); *e.g.*, Judgment 2 (recommending that the BOP place petitioner at FCI Dublin/Pleasanton and that she participate in the 500 Hour Drug Program at that facility).[6] Thus, Sections 3553(a)(2)(D) and

[6] Pursuant to statutory direction, the BOP operate several different rehabilitative programs in prison facilities. See 18 U.S.C. 3621(e) (sub-

3582(a) "harmonize comfortably with each other in a rational scheme that retains the sentencing goal of rehabilitation but pursues this goal through means other than incarcerating a defendant or keeping him in prison longer." *In re Sealed Case*, 573 F.3d at 851.

C. Construing Section 3582(a) To Prohibit Courts From Imposing Or Lengthening A Term Of Imprisonment To Rehabilitate The Defendant Furthers The Purposes Of The Sentencing Reform Act

1. As noted above, the SRA overhauled federal criminal sentencing practices. Before the SRA, the federal government "employed in criminal cases a system of indeterminate sentencing," complemented by "the utilization of parole, by which an offender was returned to society under the 'guidance and control' of a parole officer." *Mistretta*, 488 U.S. at 363. In this indeterminate sentencing scheme, "Congress defined the maximum [sentence], the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment" based on the parole officer's assessment of the defendant's rehabilitation. *Id.* at 365; Senate Report 38. As *Mistretta* explained, "[b]oth indeterminate sentencing and parole were based on the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society." 488 U.S. at 363. The SRA eliminated indeterminate sentencing and parole and

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stance abuse treatment); 18 U.S.C. 3621(f) (sex offender treatment); 18 U.S.C. 3624(f) (functional literacy).

replaced them with a determinate sentencing scheme governed by the then-mandatory Sentencing Guidelines. *Id.* at 367. In so doing, Congress rejected as "outmoded" the prior "rehabilitation model" of sentencing. Senate Report 38; see *Mistretta*, 488 U.S. at 366; *Manzella*, 475 F.3d at 157.

The Senate Report accompanying the bill that became the SRA explained that "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." Senate Report 38. Accordingly, Congress "retained rehabilitation and correction as an appropriate purpose of a sentence, while recognizing, in light of current knowledge, that 'imprisonment is not an appropriate means of promoting correction and rehabilitation.'" *Id.* at 76 (quoting proposed 18 U.S.C. 3582(a)). Interpreting Section 3582(a) as prohibiting courts from relying on rehabilitation not only to justify imposing a term of imprisonment in the first place, but also to justify lengthening the term imposed, more fully advances Congress's goals. Indeed, as the D.C. Circuit has explained, that is the only reading of Section 3582(a) that makes logical sense: if "imprisonment is not an appropriate means of promoting rehabilitation, how can *more* imprisonment serve as an appropriate means of rehabilitation?" *In re Sealed Case*, 573 F.3d at 849.

Moreover, as the Senate Report indicates, in rejecting the rehabilitation model, Congress specifically rejected the notion that the length of a defendant's imprisonment should be determined by whether or when he or she becomes rehabilitated. As the Report explains, the rehabilitation model "tie[d] prison release dates to the

successful completion of certain vocational, educational, and counseling programs within the prisons." Senate Report 40. Congress rejected the model largely because "studies suggest[ed] that this approach ha[d] failed, and most sentencing judges as well as the Parole Commission agree[d] that the rehabilitation model is not an appropriate basis for sentencing decisions." *Ibid.* Congress therefore could not have intended district courts under the new system to lengthen a defendant's term of imprisonment based on speculation that the increased period of incarceration would promote the defendant's rehabilitation.

2. Interpreting Section 3582(a) to bar sentencing courts from imposing or lengthening a term of imprisonment in order to facilitate the defendant's rehabilitation also accords with the courts' lack of authority to place defendants in particular facilities or rehabilitative programs.

"After a district court sentences a federal offender, the Attorney General, through the BOP, has the responsibility for administering the sentence." *United States* v. *Wilson*, 503 U.S. 329, 335 (1992) (citing 18 U.S.C. 3621(a)). The BOP has broad discretion to "designate the place of the prisoner's imprisonment" based on BOP's determination of the facility that is "appropriate and suitable." 18 U.S.C. 3621(b) (Supp. III 2009). The BOP's authority encompasses the prerogative to determine in what rehabilitative programs a prisoner may participate, subject to statutory constraints, such as the requirement that the BOP "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." *Ibid.* See, *e.g.*, 18 U.S.C. 3621(e) (requiring the BOP to give priority for treatment based on a

prisoner's proximity to release date). Accordingly, although sentencing judges may recommend placement in particular facilities or programs, see p. 26, *supra*, actual placement "decisions [are] within the sole discretion of the [BOP]." *United States* v. *Melendez*, 279 F.3d 16, 18 (1st Cir.) (quoting *Thye* v. *United States*, 109 F.3d 127, 1130 (2d Cir. 1997) (citation and internal quotation marks omitted)), cert. denied, 535 U.S. 1120 (2002). See *Jackson*, 70 F.3d at 877-878; *United States* v. *Williams*, 65 F.3d 301, 307 (2d Cir. 1995).

Given the limitations on judicial authority, Section 3582(a) should not be construed to empower judges to impose "a specific term of imprisonment based on the uncertain placement of a defendant in a rehabilitative program." *Manzella*, 475 F.3d at 158. That construction would allow a defendant to be "locked up in order to put [her] in a place where it [is] hoped that rehabilitation [will] occur" without any guarantee that she will participate in the desired rehabilitative program. *Maier*, 975 F.2d at 946.[7]

D. The Drafting And Legislative History Confirms That Section 3582(a) Prohibits Using Rehabilitation To Justify Imposing Or Lengthening A Term Of Imprisonment

1. The SRA's drafting history reinforces the conclusions that Section 3582(a)'s prohibition is categorical and that it encompasses both imposing a term of imprisonment and lengthening the term for the purpose of promoting the defendant's rehabilitation.

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[7] Indeed, according to BOP records, petitioner did not participate in the drug treatment program recommended by the district court. Instead, petitioner participated in a 12-hour drug education course.

The SRA was the product of a years-long effort to comprehensively reform federal criminal law. The first major bills in that effort contained sentencing reform provisions, but they did not restrict courts from considering rehabilitation when imposing terms of imprisonment. See, *e.g.*, S. 1, 94th Cong., 1st Sess. § 2302 (as introduced Jan. 15, 1975) (directing courts, when imposing a term of imprisonment, to consider the defendant's rehabilitative needs).

Restrictions on the consideration of rehabilitation first appeared in the Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess. (as reported by the S. Comm. on the Judiciary Nov. 15, 1977). As introduced, the bill did not contain any such restrictions, but the Senate Judiciary Committee amended the bill to limit the use of imprisonment to promote rehabilitation to exceptional cases. See *id.* § 101 (proposed 18 U.S.C. 101(b)(4)); *id.* § 124 (proposed 28 U.S.C. 994(j)).

Thus, as reported, S. 1437 contained a provision stating that the purposes of the federal criminal code include prescribing sanctions for criminal conduct that will deter such conduct, protect the public, assure just punishment, and "promote the correction and rehabilitation of persons who engage in such conduct, *recognizing that imprisonment is generally not an appropriate means of promoting correction and rehabilitation.*" S. 1437, § 101 (proposed 18 U.S.C. 101(b)(4)) (emphasis added). The phrase "recognizing that imprisonment is generally not an appropriate means of promoting correction and rehabilitation" is identical to the phrase in Section 3582(a) as enacted by the SRA, except that, unlike Section 3582(a), it includes the qualifier "generally."

S. 1437, as reported, also included a provision that directed the Sentencing Commission to "insure that the

guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of providing the defendant with needed education or vocational training, medical care, or other correctional treatment, *other than in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact.*" S. 1437, § 124 (proposed 28 U.S.C. 994(j)) (emphasis added). That provision is identical to Section 994(k) as enacted by the SRA, except that it permits the imposition of imprisonment as a means of promoting rehabilitation in the "exceptional case."

The committee report accompanying S. 1437 made clear that the bill's provisions reflected the view that, except in rare cases, rehabilitation is not an appropriate basis for either imposing a term of imprisonment in the first instance or lengthening of the term. The report explained that proposed Section 994(j) "makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided unless the judge finds that the sole way in which an appropriate program can be provided in order to achieve a purpose of sentencing in the particular case is to sentence the defendant to prison." S. Rep. No. 605, 95th Cong., 1st Sess. 1168 (1977); see *id.* at 883 (referring to such a situation as "the rare case"). And, discussing the purposes of sentencing, the report stated that "the purpose of rehabilitation is not currently thought to be sufficient in most cases as the sole purpose of a sentence to a term of imprisonment or, where there are other reasons for imprisonment, such as deterrence or incapacitation, to be a fair basis for determining the length of a term of imprisonment." *Id.* at 891.

In the 96th Congress, the Senate Judiciary Committee again reported a comprehensive criminal reform bill, S. 1722, 96th Cong., 1st Sess. (as reported Jan. 17, 1980). Like the bill reported in the previous Congress, S. 1722 contained provisions restricting reliance on rehabilitation as a justification for imprisonment. The provisions in S. 1722, however, differed from the previous provisions in critical ways.

In S. 1722, the language admonishing courts to recognize the inappropriateness of using imprisonment as a means of rehabilitation was moved from the section addressing the general purposes of the criminal code to a section equivalent to Section 3582(a). That section, entitled "Factors to be Considered in Imposing a Term of Imprisonment," stated:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 2003(a) [a provision similar to current Section 3553(a)] to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.*

S. 1722, § 101 (proposed 18 U.S.C. 2302(a)) (emphasis added). That language is substantively identical to the language of Section 3582(a) but differs from the language in the prior bill in a critical respect—it omits the qualifier "generally."

S. 1722 also removed the language from the previous bill that would have been codified in Section 994(j) and that allowed for the imposition of a term of imprisonment based on a defendant's rehabilitative needs in an "exceptional case." Instead, S. 1722 contained a provi-

sion identical to Section 994(k) as enacted by the SRA, which categorically directed the Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." S. 1722, § 125 (proposed 28 U.S.C. 994(j)).

The committee report accompanying S. 1722 included language similar to the language in the report from the prior Congress, but the language in the new report contained significant changes reflecting the shift to a categorical ban on relying on rehabilitation. The report repeated the language from the prior report stating that proposed Section 994(j) "makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided," but the report omitted the language that had recognized an exception to the rule. See S. Rep. No. 553, 96th Cong., 2d Sess. 1243 (1980). And, in the discussion of the purposes of sentencing, the report deleted the prior language stating that rehabilitation is not currently thought "to be sufficient in most cases as the sole purpose of a sentence to a term of imprisonment" and replaced it with categorical language. Thus, the report stated that "[t]he Committee recognizes that the purpose of rehabilitation is not currently thought to be an appropriate purpose of a sentence to a term of imprisonment or, where there are other reasons for imprisonment, such as deterrence or incapacitation, to be a fair basis for determining the length of a term of imprisonment." *Id.* at 942. Notably, the new report retained the language from the prior report making clear that the restriction on relying on rehabilitation applies not only when a court determines whether to impose a term of

imprisonment but also when the court determines the length of the term.

Aside from renumbering changes, the relevant provisions of the sentencing reform bill reported by the Senate Judiciary Committee in the 97th Congress were essentially the same as the provisions in S. 1722. See S. 1630, 97th Cong., 1st Sess. (as reported Jan. 25, 1982). Substantively identical provisions were also included in the bill in the 98th Congress, S. 1762, 98th Cong., 1st Sess. (as reported Sept. 14, 1983), which ultimately became the SRA.

2. The Senate Report accompanying S. 1762 further evidences that Congress intended to enact an absolute prohibition against imposing or lengthening a term of imprisonment to promote a defendant's rehabilitation. The Report states that the SRA recognizes "four purposes of sentencing" and "has not favored one purpose of sentencing over another except where the sentence involves a term of imprisonment." Senate Report 67. The Report goes on to explain that "Section 3582(a) provides * * * that in determining whether to impose a sentence of imprisonment and *in determining the length of a term of imprisonment*, the sentencing judge should recognize that 'imprisonment is not an appropriate means of promoting correction and rehabilitation.'" *Id.* at 67 n.140 (emphasis added). This restatement of Section 3582(a) confirms that the directive against using rehabilitation to justify imprisonment applies with the same force when the sentencing court is "determining the length of a term of imprisonment" as when the court is determining "whether to impose a sentence of imprisonment" in the first instance.

A later passage of the Report underscores the point. In discussing a directive to the Sentencing Commission

about sentence modifications (currently codified at 28 U.S.C. 994(t)), which states that "[r]ehabilitation of the defendant alone shall not be considered" a ground for modifying a previously imposed sentence, the Report notes that this limitation is "consistent with the rejection by the Committee of the rehabilitation theory as the basis for *determining the length of a term of imprisonment*." Senate Report 179 (emphasis added).

The Senate Report also shows that Congress intended Section 3582(a)'s prohibition to be categorical. In explaining an instruction to the Commission to ensure that the Guidelines are entirely neutral as to race, sex, national origin, creed, and socio-economic status, the Report states that this provision, "when read with the provisions in proposed section 3582(a) of title 18 and 28 U.S.C. 994(k), which *precludes* the imposition of a term of imprisonment for the sole purpose of rehabilitation, makes clear that a defendant should not be sent to prison only because the prison has a program that 'might be good for him.'" Senate Report 172 n.410 (emphasis added).[8]

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[8] Moreover, the Report confirms that, as discussed above, when Congress intended merely to discourage rather than to prohibit consideration of a particular factor at sentencing, Congress used the modifier "general" in discussing the inappropriateness of considering the factor. See pp. 22-23, *supra*. In discussing 28 U.S.C. 994(e)'s instruction that the Sentencing Commission ensure that the Guidelines reflect the "general inappropriateness" of considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties, the Report explains that "the Committee decided to describe these factors as 'generally inappropriate,' rather than always inappropriate, * * * in order to permit the Sentencing Commission to evaluate their relevance, and to give them applica-

In some instances, when the Senate Report describes Section 3582(a)'s restriction on the consideration of rehabilitation, the Report does not explicitly state that the restriction applies to a determination to lengthen the term as well as to impose imprisonment in the first instance. Thus, the Report states that Section 3582(a)

> specifies, in light of current knowledge, that the judge should recognize, in determining whether to impose a term of imprisonment, "that imprisonment is not an appropriate means of promoting correction and rehabilitation." This caution concerning the use of rehabilitation as a factor to be considered in imposing sentence is to discourage the employment of a term of imprisonment on the sole ground that a prison has a program that might be of benefit to the prisoner. This does not mean, of course, that if a defendant is to be sentenced to imprisonment for other purposes, the availability of rehabilitative programs should not be an appropriate consideration, for example, in recommending a particular facility.

Senate Report 119.

The absence of an express reference in this passage to the length of the term of imprisonment does not, however, overcome the clear statutory text and confirmation elsewhere in the Senate Report that Section 3582(a)'s restriction applies "in determining the length of the term." 18 U.S.C. 3582(a); see Senate Report 67 & n.140, 179. Instead, the passage's references to "impos[ing] a term of imprisonment" and "employment of a term of

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tion in particular situations found to warrant their consideration." Senate Report 175. "[T]hus," the Report states, "the guidance in this subsection is cautionary rather than proscriptive." *Ibid.*

imprisonment" logically encompass determination of the length of the term, given that any decision to incarcerate necessarily includes a decision about the length of the incarceration and that the word "term" itself means "the time or period through which something lasts." *Random House* 1958; accord *Webster's Third* 2358. And the fact "[t]hat sentencing courts may consider rehabilitation in recommending a particular facility," as the Senate Report observed, "hardly suggests that [courts] may keep a defendant in that or any other prison facility for a longer period of time for rehabilitative purposes." *In re Sealed Case*, 573 F.3d at 850.

The SRA's drafting and legislative history thus confirms what the other tools of statutory construction indicate: Section 3582(a) categorically precludes a sentencing court from imposing or lengthening a term of imprisonment in order to promote the defendant's rehabilitation. The drafting history shows that Congress considered legislation that would have allowed courts to rely on rehabilitation as a justification for imprisonment in the exceptional case, but Congress chose to enact statutory language that eliminated that exception. And the committee reports accompanying the evolving legislation consistently made clear that the restrictions on relying on rehabilitation were intended to apply both when courts decide whether to impose a term of imprisonment and when they decide how long a term to impose.

E. The Reasons Offered By Some Circuits For Limiting Section 3582(a)'s Prohibition To The Determination Whether To Impose A Term Of Imprisonment In The First Instance Are Unpersuasive

Although no court of appeals has interpreted Section 3582(a)'s directive against using rehabilitation to justify

imprisonment as anything other than a categorical ban, several circuits have concluded that the prohibition applies only to a court's determination whether to impose a term of imprisonment in the first instance and not to a determination to lengthen the imprisonment term. The Ninth Circuit first adopted that interpretation of Section 3582(a) in *Duran*, 37 F.3d at 561, and the Sixth and Eighth Circuits then followed suit without much additional analysis. See *Hawk Wing*, 433 F.3d at 630-631; *Jackson*, 70 F.3d at 879-880; see also *Giddings*, 37 F.3d at 1096-1097. The reasoning of those courts is not persuasive.

In reaching its interpretation, the *Duran* court appears to have construed the word "imprisonment" to encompass only a defendant's initial placement in prison and not his or her continued incarceration. See p. 9, *supra*. As noted by the D.C. Circuit and explained above, however, the dictionary definition of "imprisonment" provides no support for that cramped construction. See *In re Sealed Case*, 573 F.3d at 850 ("According to the dictionary, 'imprisonment' means '[t]he action of imprisoning, *or* [the] fact or condition of being imprisoned.'") (quoting *OED* 746). "In context as well, 'imprisonment' encompasses the decision to imprison a defendant for a longer period of time," because when a court decides to imprison the defendant for an additional period, the court is, as to that period of time, choosing "imprisonment" over release. *Ibid.*

The court in *Duran* also reasoned that, if Congress had wanted to prohibit courts from using rehabilitation to justify lengthening a defendant's term of imprisonment, "it could have enacted a statute that admonished judges to recognize 'that imprisonment *or the length of imprisonment* is not an appropriate means of promoting

correction and rehabilitation.'" 37 F.3d at 561. Congress's failure to utilize that formulation is entirely understandable, however, because that language could be interpreted to prohibit sentencing courts from not only imposing longer terms of imprisonment to promote a defendant's rehabilitation but also imposing shorter terms for that purpose. Congress did not intend to prohibit courts from imposing less imprisonment in order to promote a defendant's rehabilitation. See *In re Sealed Case*, 573 F.3d at 851; *Maier*, 975 F.2d at 946-947. On the contrary, as discussed above, Congress specifically envisioned that courts might choose probation in lieu of imprisonment in order to promote the defendant's rehabilitation or might impose a short term of imprisonment followed by a term of supervised release for that purpose. See Senate Report 91-92, 124; p. 25, *supra*.

Furthermore, as the Third and D.C. Circuits have pointed out, Congress had no need to use any different or additional language, because Section 3582(a) already contains an "express instruction that sentencing courts must recognize the inappropriateness of imprisonment for rehabilitation both in choosing [a term of] imprisonment rather than a non-incarceration sentence and 'in determining the length of the term.'" *In re Sealed Case*, 573 F.3d at 850 (quoting 18 U.S.C. 3582(a)); see *Manzella*, 475 F.3d at 160. "[T]he possibility that a clearly worded statute might be even more clearly worded does not negate the fact that it is clear." *In re Sealed Case*, 573 F.3d at 850 (citation omitted).

The courts of appeals that follow the *Duran* approach have also suggested that limiting Section 3582(a)'s prohibition to the decision whether to impose a term of imprisonment in the first instance is necessary to avoid a conflict with Section 3553(a)(2)(D)'s require-

ment that courts consider a defendant's correctional needs in fashioning the sentence. See *Jimenez*, 605 F.3d at 424; *Hawk Wing*, 433 F.3d at 629-630; *Duran*, 37 F.3d at 561. This "supposed conflict," however, "is illusory." *Manzella*, 475 F.3d at 157. As explained above, "[S]ection 3582(a) has a narrower scope than section 3553; the former deals specifically with *imprisonment*, while the latter addresses imposition of a *sentence*, a broader concept that encompasses imprisonment as well as probation and fines." *In re Sealed Case*, 573 F.3d at 851; see pp. 23-25, *supra*. "So understood, the 'conflict' between §§ 3582(a) and 3553(a)(2)(D) wanes away: courts must consider a defendant's need for rehabilitation when devising an appropriate *sentence* (pursuant to § 3553(a)(2)(D)), but may not carry out that goal by *imprisonment* (pursuant to § 3582(a))." *Manzella*, 475 F.3d at 158. Thus, reading Section 3582(a) to prohibit sentencing courts from imposing or lengthening a term of imprisonment in order to rehabilitate the defendant "respects [the statute's] plain text and gives effect to each of its clauses, while allowing [both] section 3582(a) and section 3553(a) to play their unique roles in the statutory scheme." *In re Sealed Case*, 573 F.3d at 850-851.

Finally, one court, relying on a single passage in the Senate Report (discussed at pp. 37-38, *supra*), has asserted that "the legislative history * * * indicates that the prohibition against considering rehabilitative needs relates to the decision of *whether to impose* imprisonment, not to the *length of the term* of imprisonment." *Giddings*, 37 F.3d at 1096 & n.17. As explained above, however, an examination of the full legislative and drafting history strongly supports interpreting Section 3582(a) as barring a sentencing court from either impos-

ing or lengthening a term of imprisonment in order to rehabilitate the defendant.[9]

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[9] Under the government's interpretation of Section 3582(a), the district court erred to the extent that it lengthened petitioner's term of imprisonment in order to provide her with access to drug treatment. Petitioner did not, however, object at sentencing on that basis. See p. 8, *supra*. Accordingly, as the court of appeals recognized (Pet. App. A2), and petitioner has herself conceded (Pet. C.A. Br. 9; Pet. Reply Br. 4), she is entitled to resentencing only if she satisfies the plain-error standard. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731 (1993). To satisfy that standard, petitioner would have to show (1) an "error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [her] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010) (citation omitted). If this Court agrees with the government's interpretation of Section 3582(a), petitioner will have satisfied the first two components of the plain-error standard. See *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (holding that the second component is satisfied if the error is clear at the time of appellate review, and the law at the time of trial was settled and clearly contrary to the law at the time of appeal). This Court should remand the case to the court of appeals, however, for that court to determine whether petitioner has satisfied the remaining components of the plain-error test.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to that court for consideration whether petitioner is able to demonstrate reversible plain error.

Respectfully submitted.

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APPENDIX

1. Section 3551 of Title 18, United States Code, provides in pertinent part:

Authorized sentences

(a) IN GENERAL.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) INDIVIDUALS.—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

* * * * *

2. Section 3553 of Title 18, United States Code, provides in pertinent part:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into

amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * * * *

3. Section 3562 of Title 18, United States Code, provides in pertinent part:

Imposition of a sentence of probation

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF PROBATION.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

* * * * *

[1] So in original. The period probably should be a semicolon.

4. Section 3563 of Title 18, United States Code, provides in pertinent part:

Conditions of probation

(a) Mandatory conditions.—The court shall provide, as an explicit condition of a sentence of probation—

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation;

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2) or (b)(12), unless the court has imposed a fine under this chapter, or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under subsection (b);

(3) for a felony, a misdemeanor, or an infraction, that the defendant not unlawfully possess a controlled substance;

(4) for a domestic violence crime as defined in section 3561(b) by a defendant convicted of such an offense for the first time that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant; and

(5) for a felony, a misdemeanor, or an infraction, that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant;

(6) that the defendant—

(A) make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and

(B) pay the assessment imposed in accordance with section 3013;

(7) that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments;

(8) for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act; and

(9) that the defendant cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000.

If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

(b) DISCRETIONARY CONDITIONS.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

(1) support his dependents and meet other family responsibilities;

(2) make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A));

(3) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

(4) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

(5) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

(6) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

(7) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

(10) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release;

(11) reside at, or participate in the program of, a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all or part of the term of probation;

(12) work in community service as directed by the court;

(13) reside in a specified place or area, or refrain from residing in a specified place or area;

(14) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

(15) report to a probation officer as directed by the court or the probation officer;

(16) permit a probation officer to visit him at his home or elsewhere as specified by the court;

(17) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

(18) notify the probation officer promptly if arrested or questioned by a law enforcement officer;

(19) remain at his place of residence during nonworking hours and, if the court finds it appropriate, that compliance with this condition be monitored by telephonic or electronic signaling devices, except that a condition under this paragraph may be imposed only as an alternative to incarceration;

(20) comply with the terms of any court order or order of an administrative process pursuant to the law of a State, the District of Columbia, or any other possession or territory of the United States, requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living;

(21) be ordered deported by a United States district court, or United States magistrate judge, pursuant to a stipulation entered into by the defendant and the United States under section 238(d)(5) of the Immigration and Nationality Act, except that, in the

absence of a stipulation, the United States district court or a United States magistrate judge, may order deportation as a condition of probation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable;

(22) satisfy such other conditions as the court may impose or;

(23) if required to register under the Sex Offender Registration and Notification Act, submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

* * * * *

5. Section 3572 of Title 18, United States Code, provides in pertinent part:

Imposition of a sentence of fine and related matters

(a) Factors to be considered.—In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

* * * * *

6. Section 3582 of Title 18, United States Code, provides in pertinent part:

Imposition of a sentence of imprisonment

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

* * * * *

7. Section 3583 of Title 18, United States Code, provides in pertinent part:

Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the

defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

* * * * *

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pur-

suant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

* * * * *

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;

* * * * *

8. Section 994 of Title 28, United States Code, provides in pertinent part:

Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentenc-

ing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

* * * * *

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

* * * * *

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(*l*) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) The appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions

of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

* * * * *

REPLY BRIEF

No. 10-5400

In the Supreme Court of the United States

ALEJANDRA TAPIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 10-5400

ALEJANDRA TAPIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3582(a), directs courts, "in determining whether to impose a term of imprisonment" and "in determining the length of the term," to "consider the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." The government reads that provision to bar sentencing courts from imposing or lengthening a defendant's term of imprisonment as a "means of promoting correction and rehabilitation." This Court appointed amicus curiae to file a brief "in support of the position that [Section] 3582(a) allows district courts to consider rehabilitative need in setting the length and term of imprisonment." 1/10/2011 Order.

As his primary argument, the court-appointed amicus advances a novel interpretation of Section 3582(a)

that was not the basis of the decision below and has not been adopted by any court of appeals. Amicus agrees with petitioner and the government that Congress enacted the SRA to "repudiate" the prior "[r]ehabilitation [m]odel" of sentencing. Br. 1. Amicus contends, however, that the repudiated "rehabilitative ideal" was limited to the notion that "isolation and prison routine" would induce rehabilitation and did not encompass rehabilitation through treatment programs targeted to offenders' specific needs. Br. 16; see Br. 1-13. From that premise, amicus argues (Br. 21-43) that Section 3582(a) "forbids" only reliance on "'imprisonment' by itself" to promote rehabilitation and does not preclude imprisoning a defendant "to allow participation in a targeted treatment program." Br. 22-23. Amicus's premise is incorrect, however, and his interpretation of Section 3582(a) cannot be squared with its text, the statutory context, or the purposes and drafting history of the SRA.

Amicus also proffers two alternative theories: first, that Section 3582(a) does not impose a categorical ban on using a term of imprisonment to promote rehabilitation but only cautions against reliance on rehabilitation as the sole justification for an imprisonment term (Br. 46-51); and, second, that Section 3582(a) does not prohibit reliance on rehabilitation to justify lengthening an imprisonment term that a court has already decided to impose for other reasons (Br. 52-56). Those back-up arguments are also incorrect. The SRA's text, purposes, and history make clear that Section 3582(a) categorically prohibits a court from imposing or lengthening a term of imprisonment to promote a defendant's rehabilitation.

I. SECTION 3582(a) PRECLUDES USING A TERM OF IMPRISONMENT TO PROMOTE REHABILITATION THROUGH A PRISON TREATMENT PROGRAM

A. The Rehabilitation Model Rejected By The SRA Included Targeted Prison Treatment Programs

Amicus's principal theory depends on the erroneous premise that the rehabilitation model rejected by the SRA did not include prison treatment programs targeted to offenders' specific needs. Although the earliest forms of the rehabilitative ideal focused on rehabilitation through "isolation and regimented prison routines" (Amicus Br. 1), amicus's own sources make clear that "[b]y the opening decades of the twentieth century, a frankly therapeutic model was in effect." Edgardo Rotman, *The Failure of Reform: United States 1865-1965*, in *The Oxford History of the Prison* 169 (Norval Morris & David J. Rothman eds. 1995) (*Oxford History*). Indeed, by the time of the sentencing reform debate that culminated in the SRA, rehabilitation efforts in prison centered on treatment programs. *Ibid.*; Norval Morris, *The Contemporary Prison: 1965-Present*, in *Oxford History* 242-243, 246-247; Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 11-12, 14 (1976). For example, federal prisons in the 1970s offered numerous rehabilitative programs, including educational programs, vocational training, counseling, and medical and psychiatric services. United States Department of Justice, Federal Bureau of Prisons (BOP), *Federal Prison System Facilities 1976*, at 11-77 (*BOP Facilities*).

In a footnote, amicus himself essentially concedes that the rehabilitation model encompassed treatment programs, but he attempts to distinguish those pro-

grams as "generic activities for all inmates" not targeted to prisoners' specific needs. Br. 4 n.3. The rehabilitation model was, however, not only treatment-based but also focused on "individualizing punishment." *Williams v. New York*, 337 U.S. 241, 247 (1949). Amicus's own sources describe the post-World War II "therapeutic model of rehabilitation" or "rehabilitative ideal" as based on "individualized treatment." *Oxford History* 189-190; accord, *e.g.*, Marvin E. Frankel, *Criminal Sentences: Law Without Order* 87 (1973); American Friends Serv. Comm., *Struggle for Justice* 39 (1971). Thus, federal prisons offered various targeted treatment programs, including individualized psychiatric counseling and long-term, residential drug treatment. *BOP Facilities* 11, 21, 23, 41, 69; BOP, *State of the Bureau 1991, The Evolving Structure of Drug Treatment* 7.

In repudiating the "rehabilitation model," the SRA specifically rejected using a term of imprisonment to promote participation in treatment programs. S. Rep. No. 225, 98th Cong., 1st Sess. 38 (1983) (Senate Report). The Senate Report accompanying the SRA describes the repudiated "model of 'coercive' rehabilitation" as based on a "theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons." *Id.* at 40. And the Report repeatedly equates "rehabilitation" with providing "programs within the prison setting," including "educational opportunity, vocational training, or other correctional treatment." *Id.* at 76, 91, 171-172 n.410.

In revising sentencing practices, the SRA rejected using an imprisonment term not only to achieve generalized rehabilitation but also to provide treatment programs targeted to individual needs. The Senate Report

states that various provisions of the SRA, including Section 3582(a), were intended to "discourage the employment of a term of imprisonment on the sole ground that a prison has a program that might be of benefit to the prisoner." Senate Report 119; see *id.* at 171 (defendants should not be "relegate[d] to prisons" because they are "in need of education and vocational training"); *id.* at 172 n.410 ("a defendant should not be sent to prison only because the prison has a program that 'might be good for him'"). Instead, Congress intended that courts use other sentencing options, such as probation, to provide targeted rehabilitative treatment. See, *e.g.*, *id.* at 76 (participation in "treatment programs such as those for persons with emotional problems or drug or alcohol problems, might be made conditions of probation for rehabilitative purposes"); *id.* at 91 ("when the purpose of sentencing is to provide the educational opportunity, vocational training, or other correctional treatment required for rehabilitation, given the current state of knowledge, probation is generally considered to be preferable to imprisonment").

B. Section 3582(a)'s Text Precludes Using A Term Of Imprisonment To Promote Rehabilitation, Including Through Targeted Treatment Programs

Based on his flawed understanding of the repudiated rehabilitation model, amicus advances (Br. 21-23) an equally flawed reading of Section 3582(a). Amicus asserts that the directive that sentencing courts "recognize[] that imprisonment is not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. 3582(a), "does not address targeted treatment programs that are available in prison" but only "'imprisonment' per se." Br. 22. Amicus argues that the "recognizing"

clause therefore does not "forbid[] a judge to lengthen a prison sentence to facilitate a defendant's entry into a treatment program," but only "forbids" imprisoning defendants based on the theory that "'imprisonment' by itself" will promote their rehabilitation. Br. 22-23.

Amicus errs in asserting that the "recognizing" clause "does not address" the provision of targeted treatment programs. Br. 22. The phrase "promoting correction and rehabilitation" refers to the rehabilitative purpose of sentencing described in 18 U.S.C. 3553(a)(2)(D)—"provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment." That purpose plainly includes providing a targeted treatment program. Indeed, amicus himself (Br. 25) describes Section 3553(a)(2)(D) as encompassing targeted treatment programs. Thus, Section 3582(a) instructs courts, when imposing or determining the length of an imprisonment term, to "recogniz[e] that imprisonment is not an appropriate means of providing targeted treatment programs, as well as other rehabilitative and correctional treatment.

Amicus also incorrectly argues that "[w]hen a judge lengthens a sentence to allow participation in a targeted treatment program, it is the treatment program," not imprisonment, "that is the means of promoting rehabilitation." Br. 22. That argument is based on an artificial distinction between using imprisonment to promote rehabilitation and using imprisonment to promote rehabilitation by facilitating access to prison programs. The subsidiary or intermediate purpose of facilitating access to prison programs does not alter the broader or ultimate purpose of promoting rehabilitation. Nor does it alter the reality that the court is using "imprisonment" as a "means" of achieving that purpose. A "means" is

"something by the use or help of which a desired end is attained or made more likely." *Webster's Third New International Dictionary* 1398 (1993) (*Webster's Third*); see *Black's Law Dictionary* 1070 (9th ed. 2009) (defining "means" as "[s]omething that helps to attain an end; an instrument"). In order to facilitate a defendant's access to a prison program for the purpose of promoting her rehabilitation, the court must place and keep the defendant in prison. In doing so, the court uses imprisonment as an "instrument" to "help[] to attain" her rehabilitation, in contravention of Section 3582(a)'s command that the court recognize that imprisonment is not an appropriate means of achieving that goal.

That the court is using imprisonment as the means of promoting rehabilitation is clear because the imposition and length of imprisonment are the only aspects of the prison sentence over which the court has authority. Sentencing courts have no power to place defendants in prison treatment programs; that authority lies with the BOP. U.S. Br. 29-30. Thus, although the district court increased petitioner's imprisonment term in part to facilitate her participation in the BOP's residential drug abuse program (RDAP), J.A. 27, whether petitioner participated depended on her meeting BOP's eligibility criteria, 28 C.F.R. 550.53, as well as her volunteering for the program, BOP, *Program Statement: Psychology Treatment Programs P5330.11*, at § 2.5.1 (2009) (*Program Statement*), and the availability of open slots, see 18 U.S.C. 3621(e)(1) (participation "subject to the availability of appropriations"). Because the court could not order petitioner's participation in RDAP, it makes little sense to describe the court as using RDAP, rather than

the increased imprisonment term, as the means of promoting petitioner's rehabilitation.[1]

Amicus's construction of Section 3582(a) has yet another logical flaw. It would allow courts to imprison defendants based on not only the "targeted" treatment programs that amicus highlights (Br. 22), but also the "generic" activities that amicus admits were part of the repudiated rehabilitation model (Br. 4 n.3). Like "targeted" programs, programs offered to all inmates are not "'imprisonment' itself." Therefore, under amicus's interpretation, they are not covered by Section 3582(a)'s "recognizing" clause. Consequently, courts could imprison defendants to facilitate access to *any* prison program or service—a result inconsistent with even amicus's constricted view of Congress's intent in enacting the SRA. Indeed, amicus's interpretation would deprive Section 3582(a) of almost any effect, because courts could imprison defendants for rehabilitative purposes so long as the courts identified anything other than confinement itself as the specific rehabilitative mechanism. It is thus unsurprising that no court of appeals has adopted amicus's interpretation.

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[1] Petitioner notes (Br. 43) that she has not participated in RDAP. According to BOP records, petitioner was encouraged to enroll during her psychology intake screening at FMC Carswell, where she is currently incarcerated, but that she stated that she was not interested, and she has not volunteered for the program. Because she has not volunteered, the BOP has not conducted a clinical interview to determine her eligibility. See *Program Statement* § 2.5.9. Petitioner also notes (Br. 43) that she was not placed in FCI Dublin, the facility recommended by the district court. BOP did not place petitioner there because it determined that she had to be separated from an inmate who was already housed at that facility. See 28 C.F.R. 524.72(f).

C. Section 3582(a)'s Statutory Context Makes Clear That The Prohibition Encompasses Prison Treatment Programs

Other provisions of the SRA confirm that Congress did not intend to exclude prison treatment programs from Section 3582(a)'s prohibition on using a term of imprisonment to promote rehabilitation.

1. As the government's opening brief describes (at 20-21), the SRA contains a directive to the United States Sentencing Commission that parallels Section 3582(a)'s directive to sentencing courts. The directive states that "[t]he Commission shall insure that the [Sentencing Guidelines] reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 U.S.C. 994(k). Section 994(k) makes absolutely clear that Congress intended to prohibit using a term of imprisonment to promote rehabilitation and correction through targeted treatment programs. Section 994(k) expressly directs that an imprisonment term not be used to "provid[e] the defendant with needed educational or vocational training, medical care, or other correctional treatment," 28 U.S.C. 994(k), which plainly encompasses treatment programs targeted to a defendant's specific needs. Indeed, the language in Section 994(k) is nearly identical to Section 3553(a)(2)(D), which amicus agrees (Br. 25) describes targeted treatment programs. Section 994(k) informs the meaning of Section 3582(a) because Congress intended the two provisions to work together to implement its determination that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Senate Report 76; see U.S. Br. 21.

Interpreting Section 3582(a) to prohibit using an imprisonment term to promote rehabilitation through prison treatment programs is also supported by the SRA's provisions governing who has authority to assign offenders to those programs. Before the SRA's enactment, sentencing courts had authority to mandate that certain offenders, such as drug addicts or youths, be confined "for treatment," 18 U.S.C. 4253(a), 5010(b) (1982), and the BOP was required to provide that treatment, 18 U.S.C. 4254, 5011 (1982). The SRA repealed that authority, see Pub. L. No. 98-473, § 218(a)(6) and (8), 98 Stat. 2027, and instead gave the BOP sole power to make treatment and program placement decisions for all offenders, see 18 U.S.C. 3621 (2006 & Supp. III 2009); p. 7, *supra*. Although courts cannot place offenders in prison treatment programs or require their participation, courts can require them to participate in treatment programs, including residential drug treatment, as a condition of probation or supervised release. 18 U.S.C. 3563(b)(9), 3583(d). That allocation of authority is inconsistent with amicus's interpretation of Section 3582(a). Instead, it supports the government's view that Section 3582(a) precludes courts from using an imprisonment term to promote a defendant's rehabilitation through treatment programs, because Congress intended courts to use other sentencing options for that purpose.[2]

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[2] Amicus observes (Br. 43) that, under 18 U.S.C. 3583(e), a court can consider rehabilitative needs in deciding whether to incarcerate a defendant for violating a condition of supervised release even though courts cannot require incarcerated defendants to participate in prison treatment programs. Allowing courts to consider rehabilitative needs in deciding whether to incarcerate defendants for violating conditions of supervised release still makes sense, however, because courts can use

2. Contrary to amicus's contention (Br. 25-30), his interpretation of Section 3582(a) is not necessary to reconcile that provision with Section 3553(a)(2)(D). As the government's opening brief explains (at 23-27), Section 3553(a)(2)(D) instructs courts to consider a defendant's rehabilitative needs, including any need for treatment programs, in fashioning the *overall* sentence, which need not include imprisonment or imprisonment alone, but can include other components, such as probation and supervised release. Although Section 3582(a) instructs that the need for rehabilitation is not an appropriate reason to impose or increase a term of imprisonment, the SRA's provisions governing non-incarcerative sentencing options permit consideration of rehabilitation. *E.g.*, 18 U.S.C. 3562(a), 3572(a), 3583(c). Thus, Section 3582(a) "harmonize[s] comfortably" with Section 3553(a)(2)(D) "in a rational scheme that retains the sentencing goal of rehabilitation," including through targeted treatment programs, "but pursues this goal through means other than incarcerating a defendant or keeping him in prison longer." *In re Sealed Case*, 573 F.3d 844, 851 (D.C. Cir. 2009).

Amicus mistakenly contends that interpreting Section 3582(a) to preclude using an imprisonment term to promote rehabilitation through treatment programs "creates an exception" to Section 3553(a)(2)(D) that would "swallow the rule" that courts must consider defendants' rehabilitative needs at sentencing. Br. 28.

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incarceration to encourage compliance with rehabilitative conditions of supervised release. For example, if a defendant has violated a condition of supervised release requiring participation in a drug treatment program, a court might conclude that the defendant's rehabilitative needs require incarceration to impress upon the defendant the importance of complying with that condition.

Contrary to amicus's contention, even though "[t]he vast majority of federal felons are sentenced to imprisonment," *ibid.*, defendants' rehabilitative needs will still be considered at every sentencing. For example, whenever a court sentences a defendant to a term of imprisonment, the court must also determine whether to impose supervised release, and the court must consider how best to provide for the defendant's rehabilitative needs in making that determination. 18 U.S.C. 3583(a) and (c).

Amicus also erroneously argues (Br. 18, 25, 29) that Congress would not have imposed a significant limitation on Section 3553(a)(2)(D) in "a different statutory provision many sections later." Br. 18. Section 3553(a) sets out general criteria that guide courts in fashioning a defendant's overall sentence, while subsequent provisions of the SRA provide more specific guidance on how those criteria apply in the context of each of the various sentencing options. U.S. Br. 3. Congress therefore placed the limitation on using a term of imprisonment to promote rehabilitation exactly where it belongs—in the statutory provision that addresses the "[f]actors to be considered in imposing a term of imprisonment." 18 U.S.C. 3582(a).

Amicus further argues (Br. 32-34) that if Congress had intended to preclude using imprisonment to further the rehabilitative purpose of sentencing, Congress would have structured Section 3582(a) like Section 3583(c), which governs the imposition of supervised release. Section 3583(c) explicitly lists each Section 3553(a) factor that courts must consider and omits the factors whose consideration Congress intended to preclude. See 18 U.S.C. 3583(c). Contrary to amicus's argument, Congress had good reasons for not using that formulation in Section 3582(a). First, Section 3583(c)

removes multiple Section 3553(a) factors from consideration (Section 3553(a)(2)(A) and Section 3553(a)(3)), while Section 3582(a) merely limits the consideration of a single factor (Section 3553(a)(2)(D)). More fundamentally, Congress did not intend to preclude courts from considering rehabilitative purposes entirely when making imprisonment decisions. Although Congress wanted to prohibit courts from imposing or lengthening a term of imprisonment to promote rehabilitation, Congress did not intend to prohibit courts from rejecting imprisonment or shortening an imprisonment term for that purpose. U.S. Br. 25, 40. Nor did Congress intend to prevent courts from recommending that defendants be placed in certain prison programs or facilities that might serve their rehabilitative needs. *Id.* at 26.

D. The SRA's Purposes And Drafting History Confirm That Section 3582(a) Precludes Using A Term Of Imprisonment To Promote Rehabilitation Through Treatment Programs

1. Amicus's interpretation of Section 3582(a) also conflicts with the SRA's purposes and drafting history. Amicus contends (Br. 30-33) that his interpretation is consistent with several of the SRA's goals, including individualizing sentences where appropriate, promoting certainty and fairness, and avoiding unwarranted sentencing disparities. That contention is beside the point, however, because amicus's interpretation is inconsistent with another central goal of the SRA—"reject[ing] imprisonment as a means of promoting rehabilitation." *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989). In conflict with that goal, amicus's interpretation would allow courts to impose or increase imprisonment terms for rehabilitative purposes whenever the courts invoke

anything besides confinement itself as the specific means of rehabilitation.

The SRA's drafting history also contradicts amicus's attempt to carve out an exception in Section 3582(a) for targeted treatment programs. A predecessor bill to the SRA, S. 1437, 95th Cong., 1st Sess. (as reported Nov. 15, 1977), contained just such an exception (although limited to the "exceptional case"), but that exception was eliminated in later predecessor bills, including S. 1722, 96th Cong., 1st Sess. (as reported Jan. 17. 1980), and in the SRA itself. U.S. Br. 31-35. That shift in language during the evolution of the SRA supports interpreting Section 3582(a) as a categorical ban on using a term of imprisonment to promote rehabilitation, including through targeted treatment programs.

Amicus notes (Br. 36-37) that the targeted treatment exception was accompanied by provisions allowing for an indeterminate sentence and parole and that, when Congress eliminated the exception, Congress also eliminated those additional provisions. Amicus argues that Congress's "target" in eliminating the exception therefore must have been indeterminate sentencing and parole rather than the use of imprisonment to facilitate targeted treatment. Br. 37. That argument ignores the fact that the language allowing the use of imprisonment to provide targeted treatment was contained in separate statutory provisions (proposed 18 U.S.C. 101(b)(4) and 28 U.S.C. 994(j)) from the provisions allowing an indeterminate sentence and parole (proposed 18 U.S.C. 2301(c), 2302(a), 3831-3835, 3841-3846 and 28 U.S.C. 994(b)(2)). See S. 1437, §§ 101, 124. If Congress had intended only to abolish parole and indeterminate sentences, but to retain use of an imprisonment term to facilitate targeted treatment, Congress could easily have

eliminated only the provisions allowing indeterminate sentences and parole. Instead, Congress eliminated all of the provisions, including the language creating the targeted treatment exception.

2. Amicus's reliance (Br. 38-39) on a sentencing reform bill introduced by Senator Kennedy in 1981 is also misplaced. That bill combined what are now Sections 3553(a) and 3582(a) in one provision that required courts, "in determining the particular sentence to be imposed," to consider, among other factors, "the need for the sentence imposed * * * with respect to a sentence other than a sentence to a term of imprisonment, to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." S. 1555, 97th Cong., 1st Sess. § 102(a) (proposed 18 U.S.C. 3579). Amicus argues that Congress would have enacted that language, rather than the language in Section 3582(a), if Congress had intended to preclude using a term of imprisonment to facilitate access to targeted treatment programs.

Congress's failure to utilize the language in S. 1555 is, however, entirely understandable. That language could have been interpreted to preclude courts from relying on a defendant's rehabilitative needs to reject a sentence of imprisonment, shorten the length of an imprisonment term, or recommend placement in particular prison facilities or programs—restrictions that Congress did not intend. See p. 13, *supra*. In addition, Congress chose an entirely different structure from S. 1555 in the SRA, placing general sentencing criteria in one provision and limitations on the consideration of those criteria in subsequent provisions dealing with the specific sentencing options. See p. 12, *supra*. In any event, S. 1555 was not a significant precursor to the SRA. Un-

like S. 1437 and S. 1722, which the Senate Report accompanying the SRA acknowledged as predecessor bills and which were reported out of Committee, see Senate Report 37, S. 1555 was merely one sentencing reform bill among many that were introduced, referred to a subcommittee, and died without further action.

3. Contrary to amicus's contention (Br. 39-41), Congress's support of prison drug treatment programs, including RDAP, does not justify his interpretation of Section 3582(a). Based on experience with the rehabilitation model, Congress "doubt[ed] that rehabilitation [could] be induced *reliably* in a prison setting," Senate Report 38 (emphasis added), and concluded that efforts to "coerc[e]" participation in prison rehabilitative programs had "failed." *Id.* at 40. Congress therefore provided in the SRA that it is "not * * * appropriate" to impose or lengthen a term of imprisonment for the purpose of rehabilitation. 18 U.S.C. 3582(a). At the same time, Congress did not intend "that efforts to rehabilitate prisoners should be abandoned." Senate Report 76. On the contrary, Congress concluded that treatment "[p]rograms within the prison setting should be available and encouraged to enhance the *possibility* of rehabilitation," *ibid.* (emphasis added), particularly if the programs are "made available to prisoners on a voluntary basis," *id.* at 173.

II. SECTION 3582(a) IMPOSES A CATEGORICAL BAN ON IMPOSING OR LENGTHENING AN IMPRISONMENT TERM TO PROMOTE REHABILITATION AND CORRECTION

Amicus also argues (Br. 23-25, 43-51) that, even if Section 3582(a) limits using imprisonment to promote rehabilitation through treatment programs, it only

"discourage[s]," but does not "forbid," reliance on treatment needs, particularly "as one factor among others." Br. 43. That alternative argument is also incorrect.

A. Section 3582(a) imposes an absolute prohibition, not a mere caution. Its text instructs courts to "recognize[] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a). A common meaning of the word "recognize" is "to acknowledge or treat as valid." U.S. Br. 18 (citing *Random House Dictionary of the English Language* 1611 (2d ed. 1987) (*Random House*)); *Webster's Third* 1896 ("to acknowledge in some definite way"); 13 *Oxford English Dictionary* 343 (2d ed. 1989) ("to treat as valid"). Whenever a court imprisons a defendant in order to rehabilitate her, the court fails "to acknowledge or treat as valid" that imprisonment is not an appropriate means of promoting rehabilitation. U.S. Br. 18-19.[3]

Although amicus observes (Br. 24 & n.5) that "recognize" has other definitions, including "to recall knowledge of," "realize," and "perceive clearly," those definitions do not suggest that Section 3582(a) is anything less than a categorical ban. A court that "knows," "realizes," or "perceives clearly" that "imprisonment is not an appropriate means of correction and rehabilitation" has no basis for using imprisonment to promote those goals.

Amicus also argues that using the term "recognizing" is a "peculiar" way to impose a categorical ban. Br. 23. The language choice makes sense, however, given the statute's drafting history. The "recognizing" clause or-

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[3] The government's opening brief also cites a definition of "recognize" that is listed as obsolete. U.S. Br. 18 (quoting *Webster's Third* 1896 as defining "recognize" to mean "to admit the fact, truth, or validity of"). That definition is, however, substantially similar to the definition discussed above, which is still in common usage.

iginated in a provision of S. 1437 stating that one purpose of sentencing was to "promote the correction and rehabilitation of persons who engage in [criminal] conduct, recognizing that imprisonment is generally not an appropriate means of promoting correction and rehabilitation." S. 1437, § 101 (proposed 18 U.S.C. 101(b)(4)). As originally formulated, with the inclusion of the modifier "generally," that provision was indeed a caution rather than an absolute prohibition. Later bills and the SRA as enacted, however, eliminated the qualifier "generally" in order to convert the caution into a categorical ban. U.S. Br. 31-36.

Particularly given that drafting history, amicus errs (Br. 43-45) in drawing a negative inference from Section 3582(a)'s failure to use alternative language that has the same import, such as the phrase "shall insure," which appears in various directives to the Sentencing Commission. Indeed, Section 994(k), the directive to the Commission that parallels Section 3582(a), does use the language amicus suggests, directing that the Commission "shall insure" that the Guidelines reflect the inappropriateness of imposing a term of imprisonment to promote rehabilitation and correction.

B. The text of Section 3582(a) also refutes amicus's contention that courts may base a term of imprisonment on rehabilitative purposes provided that consideration is only one factor among others. A court fails to "recognize[] that imprisonment is not an appropriate means of promoting correction and rehabilitation" whenever the court imposes a term of imprisonment, or lengthens the term, for the purposes of promoting rehabilitation. 18 U.S.C. 3582(a). That remains true even if the court also invokes other factors in justifying the chosen term. The court's reliance on rehabilitative purposes may be

harmless, but it is still improper. See *Williams* v. *United States*, 503 U.S. 193, 203 (1992).

Contrary to amicus's contention (Br. 46-47), Section 994(k) reinforces, rather than undermines, that construction of Section 3582(a). Amicus mistakenly reads Section 994(k) as if it barred using a term of imprisonment "for the *sole* purpose" of providing rehabilitation. Section 994(k) does not include that qualification. And Congress knew how to impose that qualification when it wanted. Congress did so in 28 U.S.C. 994(t), which directs the Commission, in promulgating policy statements concerning extraordinary and compelling reasons for sentence reduction under 18 U.S.C. 3582(c)(1)(A), that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" that justifies reducing a previously imposed imprisonment term.

C. The legislative history also does not support amicus's position. Amicus relies on the Senate Report's description of Section 3582(a) as a "caution" designed to "discourage" the use of imprisonment to promote rehabilitation. Br. 48 (quoting Senate Report 119). That language, however, cannot overcome the statute's plain text, its drafting history, and other statements in the legislative history, all of which make clear that Section 3582(a) imposes a categorical prohibition. See pp. 17-18, *supra*; U.S. Br. 31-36. Amicus also selectively quotes passages from the Senate Report disapproving imprisonment "on the sole ground" or "only because" a prison has a treatment program that might benefit the defendant. Br. 49 (quoting Senate Report 119, 172 n.410). Read in context, those statements mean that courts may not impose or lengthen a term of imprisonment unless imprisonment is independently justified by a sentencing

goal other than rehabilitation. In any event, the statements cannot justify disregarding Section 3582(a)'s plain text, which precludes courts from imposing or lengthening a term of imprisonment in order to promote rehabilitation.[4]

Interpreting Section 3582(a) as precatory language that merely discourages courts from relying on rehabilitation alone to justify imprisonment would frustrate entirely Congress's intent to repudiate the rehabilitation model. Under that interpretation, courts could not only impose or increase an imprisonment term to take advantage of prison treatment programs or services. Courts could also imprison defendants on the theory that isolation alone would promote their rehabilitation, a result that amicus himself agrees Congress intended to "forbid[]" when it rejected the rehabilitation model. Br. 23.

III. THE PROHIBITION IN SECTION 3582(a) APPLIES TO A DECISION TO LENGTHEN A TERM OF IMPRISONMENT

A. As his second back-up argument (Br. 52-56), amicus interprets Section 3582(a) as did the court below—to prohibit courts from relying on a defendant's rehabilitative needs only in making the initial determination to impose a term of imprisonment, but not to prevent a

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[4] Amicus's interpretation is also not supported by statements that an imprisonment term "imposed for another purpose of sentencing may * * * have a rehabilitative focus" if rehabilitation is "an appropriate secondary purpose of the sentence." Br. 50 (quoting Senate Report 176). Such statements simply reflect that, when a court imposes imprisonment based on other sentencing goals, Section 3582(a) does not prohibit prison treatment programs "to enhance the possibility of rehabilitation." Senate Report 76. Nor does it prohibit sentencing courts from considering "the availability of rehabilitative programs" in "recommending a particular facility." *Id.* at 119.

court from relying on rehabilitative needs to lengthen an imprisonment term that the court has decided to impose for other reasons. That argument conflicts with the plain text of the statute, the initial clause of which makes clear that its prohibition applies both "in determining whether to impose a term of imprisonment" and "in determining the length of the term." 18 U.S.C. 3582(a); see U.S. Br. 16-18.

Amicus's alternative reading would give the word "imprisonment" two different meanings in the same statutory provision. Amicus asserts that, in Section 3582(a)'s "recognizing" clause, "imprisonment" means "the act of confining," rather than "[t]he state of being confined." Br. 52-53. But "imprisonment" clearly does not mean "the act of confining" in the initial clause of Section 3582(a). That clause speaks of a court's "determining whether to impose a term of imprisonment." 18 U.S.C. 3582(a). The clause uses the word "impose" to refer to the act of confining. Therefore, in Section 3582(a)'s initial clause, "imprisonment" necessarily means "[t]he state of being confined." Nothing overcomes the presumption that Congress intended the same term to have the same meaning in the "recognizing" clause just a few words later. See *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

Amicus's contention that Section 3582(a) permits courts to lengthen a term of imprisonment for rehabilitative purposes also cannot be squared with his earlier acknowledgment that the SRA "forbids" courts from using "'imprisonment' by itself" to promote rehabilitation. Br. 23. If Section 3582(a) applied only to the initial decision whether to imprison, nothing would prevent courts from basing the length of an imprisonment term on that "forbidden rehabilitative ideal." *Ibid.* Thus,

once a court decided to impose even a day of imprisonment based on other considerations, the court could extend the term for years based on the theory that confinement alone would rehabilitate the defendant—a theory that even amicus agrees the SRA repudiated.

B. Contrary to amicus's contention (Br. 53), Section 994(k) does not support his argument. Unlike Section 3582(a), Section 994(k) refers only to "the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant" and does not separately mention the inappropriateness of increasing the length of the term. 18 U.S.C. 994(k). But that omission in Section 994(k) does not mean that the prohibition in Section 3582(a) encompasses only the decision to impose imprisonment in the first instance. First, whatever the omission suggests about the scope of Section 994(k), Section 3582(a) expressly includes a reference to the "length" of imprisonment. Second, Section 994(k)'s reference to "imposing a sentence to a term of imprisonment" is easily understood to encompass both the fact and length of imprisonment, because the word "term" means "the time or period through which something lasts." *Random House* 1958; accord *Webster's Third* 2358; see *Cullen* v. *Pinholster*, No. 09-1088 (Apr. 4, 2011), slip op. 12 n.7 (declining to attach significance to the omission of additional clarifying language even though that language was included in a related provision).

Amicus also mistakenly argues (Br. 54) that his alternative interpretation of Section 3582(a) is supported by the absence of a prohibition against relying on rehabilitation in 18 U.S.C. 3584(b), which addresses consecutive sentences. Because a decision to impose consecutive prison sentences is, as amicus himself contends, "in sub-

stance, a decision to lengthen the term of imprisonment" (Br. 54), the prohibition in Section 3582(a) itself applies to that determination. See 18 U.S.C. 3582(a) (stating that its prohibition applies "in determining the length of the term"). Congress therefore did not need to include an additional prohibition in Section 3584(b). In any event, Congress's failure to include a similar prohibition in Section 3584(b) would not justify disregarding the prohibition imposed by the plain text of Section 3582(a).

C. Finally, amicus errs in contending (Br. 54-55) that the legislative history supports limiting Section 3582(a) to the initial decision whether to impose a term of imprisonment. Although one passage in the Senate Report describes Section 3582(a) without expressly stating that it applies when a court determines the length of an imprisonment term, neither that passage nor anything else in the Report affirmatively states that courts may lengthen terms of imprisonment to promote rehabilitation. That isolated passage therefore cannot overcome the clear statutory text and confirmation elsewhere in the Report that Section 3582(a)'s prohibition applies "in determining the length of the term." 18 U.S.C. 3582(a); see U.S. Br. 37-38; Senate Report 67 & n.140, 179.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be vacated and the case remanded for consideration whether petitioner can demonstrate reversible plain error.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

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REPLY BRIEF

No. 10-5400

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ALEJANDRA TAPIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) . . . , recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.[1]

The import of these words and the common understanding of their meaning are clear: Whether imposing or determining the length of prison sentences, judges must accept that imprisonment may not be used to further rehabilitation.

Amicus makes the counter-intuitive argument that this language *invites* courts to impose sentences of imprisonment to promote rehabilitation – so long as the sentencing court hopes that, in the future, the Bureau of Prisons ("BOP") will place the inmate in a "targeted treatment program" – something neither the Sentencing Reform Act ("Act") nor §3582(a) mentions. Amicus' "targeted treatment" interpretation is not so much statutory construction as statutory invention. In truth, the statute's plain meaning and structure forbid, rather than encourage, imprisonment to provide offenders with treatment. Judges sentence offenders to prison, not prison-based programs. The Act empowers judges to mandate treatment as a

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[1] 18 U.S.C. §3582(a).

condition of probation or supervised release. But it entrusts solely to the BOP the decision to allow an inmate to participate in prison-based rehabilitation programs.

Legislative history confirms this understanding of the Act's plain language. That history evinces Congress' hostility to the rehabilitative model and the practice of "coercive rehabilitation" in which prison sentences were tied to the successful completion of treatment and rehabilitation programs. Perhaps more telling, as legislation that became the Act moved through successive iterations and Congresses, it changed from permitting rehabilitative imprisonment in exceptional circumstances, to barring it "generally," to banning it categorically.[2]

The plain language, structure, and legislative history of the Act confirm that it does not allow judges to impose or increase prison sentences to provide offenders the chance to participate in rehabilitative programs.

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[2] *See* S. 1722, 96th Cong., 2nd Sess. §2302 (as reported Jan. 17, 1980) (striking the word "generally" from the bill's instruction that courts must "recogniz[e] that imprisonment is not *generally* an appropriate means of promoting correction and rehabilitation") (emphasis added) (copy attached in Appendix at App. 2)

I. The Act's Plain Language Bars Imprisonment-For-Treatment.

A. The Statute Includes No Exception for "Targeted Treatment."

Amicus' principal argument is that the words "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation" mean not what they say but rather "remind judges of the failure of the rehabilitative ideal" and instruct them "not [to] confuse 'grand inanities about universal redemption' with the statute's more specific and practical approach to treatment." Brief of Amicus Curiae ("AC") 11, 23. Amicus argues that the statute embraces "targeted treatment programs." *Id.* 23.

Amicus is not interpreting statutory language: The phrases "targeted treatment program" and "rehabilitative ideal" appear nowhere in the Act. The statute contains no discussion of the history of penology in America or its failures. It contains no discussion of treatment options, targeted or otherwise. As to imprisonment, the statute's commands are simple: Consider the purposes of retribution, deterrence, incapacitation, and rehabilitation; do not imprison for the sake of rehabilitation. Amicus' argument would create a very different statute, one that requires judges to "recollect" the history of the rehabilitative model and the debate over its efficacy and parse, without congressional guidance, the differences between "correction and rehabilitation" on the one hand and "targeted treatment" on the other. AC:24-25. Amicus argues, in effect, that Congress has

directed sentencing courts to bear in mind the failures of the rehabilitative model while simultaneously licensing courts to repeat those mistakes. That "targeted treatment programs" and the "rehabilitative ideal" are never mentioned in the Act, let alone identified as mandatory considerations for custody decisions, shows that Amicus' proposed reading of the statute does not interpret its words but re-writes them.

Amicus argues that imprisonment to make available a program does not contravene the statute's plain language because: "When a judge lengthens a sentence to allow participation in a targeted treatment program, it is the treatment program, not 'the act of confining a person' . . . that is the means of promoting rehabilitation." AC:22. But the statute does not require that judges recognize "imprisonment does not rehabilitate." It requires they recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. §3582(a). "Promote" does not mean "effect." It means "advance the interests of" or "further the growth, development, progress, or establishment of." *Oxford English Dictionary* promote (def.I & I2a) (3d ed.), http://www.oed.com (last visited Apr. 5, 2011) ("OED"). A judge imposing imprisonment to make accessible a rehabilitative treatment program is using imprisonment to "advance the interests of" or "further the growth, development, progress or establishment of" rehabilitation. Amicus' proposal falls squarely within §3582(a)'s express proscription.

B. "Recognizing" Means "Accepting As True."

Amicus' argument turns on ascribing to the word *recognizing* in §3582(a) a meaning inconsistent with the grammatical structure of the sentence Congress wrote. Amicus contends that "recognizing" does not mean "acknowledge the existence or truth of" and "admit the fact, truth, or validity of" as Petitioner and the Government argue, Petitioner's Brief ("PB") 26 n.18; Solicitor General's Brief ("SB") 18. Amicus posits that "recognizing" means "'[t]o know again,' 'recollect,' or 'recall to mind.'" AC:23-24 (citing the *OED*, *Webster's Third International Dictionary*, and *Random House Dictionary of the English Language*, as well as two Latin dictionaries). Noting the word's origins in the Latin *recognōscere*, meaning "know again," "recall," and "recollect," Amicus asserts this is the intended meaning in §3582(a). However, the grammatical context of §3582(a) makes clear the meaning Congress intended – and that Amicus is wrong.

"Recognize" as defined by Amicus is a transitive verb. It takes a noun object, i.e., *recognize a face*. "Recognize" as defined by Petitioner may take a direct-object complement or may be followed by a subordinate *that*-clause, i.e., *recognize that Barack Obama is president*. *See OED* recognize (def.3c) (3d ed.), http://www.oed.com (last visited Apr. 5, 2011). When recognize means "recall to mind," it cannot take a *that*-clause as its complement. Thus, "I recognize this place" can mean "I recall this place." But, "I recognize that this place is my home" means "I realize (or understand, apprehend, or accept) that this place

is my home." Because *recognize* in §3582(a) occurs in collocution with a *that*-clause ("recognizing that imprisonment is not . . . "), it cannot mean what Amicus asserts.[3]

As noted, Amicus argues his preferred sense of the word "recognize" from its Latin origin, but this view is anachronistic and oversimplified. Original senses of borrowed words are often a poor indication of current meanings. The modern English word *salary* derives from the Latin word for a soldier's allowance for his salt-ration, but that fact hardly elucidates its contemporary meaning. The verb *recognize* was not borrowed directly from Latin; it came into the language via Norman French legal usage after the Conquest, first appearing in Scottish legal texts with a specialized meaning. *See OED* recognize (3d ed.), http://www.oed.com (last visited Apr. 5, 2011).[4] One cannot simply consult a Latin

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[3] *See also* Thomas Herbst, et al , *A Valency Dictionary of English* 658-59 (2004) (listing a *that*-complement structure only for the "acknowledge" sense of *recognize*, not the "identify" sense). Note also that the second edition of the *OED* specifically states that the meaning "treat as valid, as having existence or as entitled to consideration" appears in absolute constructions, as Petitioner proposes for §3582(a). *OED* recognize (def.4a) (2d ed. 1989), http://www.oed.com/oed2/00199328 (last visited Apr. 5, 2011); *see* PB.17-18.

[4] The sense proffered by Petitioner and the Government first appeared in the 16th century, about 50 years before the first occurrence of the sense asserted by Amicus. *See id.* (def.2a, 3a & 5a). Amicus' claim that "[j]udges must re*cognize* – 'recall to mind' . .," AC:24, seems to confuse this verb with the separate verb *re-cognize* (so spelled and with different pronunciation)

(Continued on following page)

dictionary and apply the definitions found there to another language's words two thousand years later.

Amicus also argues that his proposed meaning of "recognize" is proper because certain English dictionaries list "recall" as the word's first definition while listing Petitioner's and the Government's proffered meaning, "acknowledge the existence or truth of" and "admit the fact, truth, or validity of," as secondary. AC:23-24 & nn.4, 5; *cf.* PB:26 n.18; SB:18. Determining what, in §3582(a), *recognizing* means is not a matter of checking which definition dictionary editors place first under its listing. The order of entries may reflect the most common use, but also some other criterion, such as historical sequence or usage factors (standard before dialect, formal before colloquial, active before obsolete, etc.).[5] Even dictionaries from the same source, produced during the same time frame, may differ in the order of entries. Amicus notes that *Webster's Third* (published in 1971) lists "recall" as the first non-obsolete meaning of *recognize*,

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meaning "to cognize again." *See id.* re-cognize. Such uses of the verb *recognize* are noted to be obsolete and rare. *See id.* recognize (def.6a, b)

[5] Amicus cites *Webster's Third*'s designation of the "admit the fact, truth, or validity of" sense as obsolete. AC.24 n.5. That dictionary gives no dated attestations to support its classification. The current edition of the *OED*, on the other hand, lists this sense as the first, non-obsolete definition and gives a 1998 quotation *OED*, recognize (def.2b), http://www.oed.com (last visited Apr. 5, 2011).

but it is the third meaning listed in *Webster's 9th New Collegiate Dictionary* 984 (1984) and *Merriam-Webster's Collegiate Dictionary* 1039 (11th ed. 2007). The "recall" sense is listed as the second non-obsolete meaning in 2 *New Shorter Oxford English Dictionary* 2503 (1993) and the second edition of the *Oxford English Dictionary* (1989), but it is listed seventh in the current, third edition. The sequence of entries is not particularly telling.

C. Section 3582's Language Is Mandatory.

Alternatively, Amicus argues that even if Congress meant what it said, that "imprisonment is not an appropriate means of promoting correction and rehabilitation," the *recognizing*-clause is merely hortatory. It only discourages sole reliance on rehabilitative concerns to justify imprisonment. AC:43-51. As Petitioner has noted, PB:26-27, no court – not even those which hold that §3582(a) allows lengthening imprisonment for rehabilitation – has questioned the mandatory force of the "recognizing" language. *United States v. Duran*, the fountainhead of such caselaw, describes §3582(a) as a "prohibition," 37 F.3d 557, 561 (9th Cir. 1994), not as a mere "warn[ing] . . . against the lure of the rehabilitative ideal's siren song." AC:43.

Amicus contends that the Act's use elsewhere of clearly mandatory language like "shall" and "assure" shows the word "recognizing" in §3582(a) to be merely precatory. AC:44-46. But, properly understood,

"recognizing" communicates categorical disapproval of prison-for-rehabilitation: "accept the authority, validity, or legitimacy of; *esp.* to accept the claim or title of (a person or group of people) to be valid or true." *OED* recognize (def.2b) (3d ed.), http://www.oed.com (last visited Apr. 5, 2011); likewise, "acknowledge the existence or truth of," *id.* (def.3a), and "perceive clearly; to realize, understand, or apprehend *that*." *Id.* (def.3c). It would be a contorted reading of this sentence to require judges accept as true that imprisonment-for-rehabilitation is inappropriate while simultaneously allowing them to impose or lengthen custody for that purpose. PB:26-27. Thus, context confirms the meaning urged by Petitioner and the Government as the one Congress intended. *See generally Deal v. United States*, 508 U.S. 129, 131-32 (1993).

Moreover, the mandatory nature of the prohibition inheres in the structure of the sentence Congress wrote. Petitioner's plain meaning analysis of §3582 demonstrates that the phrase, "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation," must be either an absolute phrase modifying the entire sentence or a participial modifier of the main clause's subject, "the court." PB:15-18. That main clause utilizes the verb *shall*, whose use indicates Congress' intent to "impose discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001). The mandatory sense of the modal verb *shall* extends throughout the entire sentence,

including the "recognizing" proviso, in accord with the usual rules of grammar.[6]

II. The Act's Structure and Context Confirm That It Bans Imprisonment-For-Rehabilitation.

A. Judges Sentence Offenders to Prison, Not Treatment Programs.

While Amicus proposes that it invites judges to impose or increase terms of imprisonment to make treatment available, the Act gives courts no authority to require the BOP to provide such treatment or mandate that offenders participate if treatment is made available. A Congress that intended judges to imprison offenders in order to put them in treatment would not have stripped those same judges of the power to accomplish this.

Courts may sentence an offender to a term of probation, a fine, or a term of imprisonment. 18 U.S.C. §3551(b). When imposing probation or supervised release, a judge – employing any of numerous standard and special conditions – has broad authority to tailor the sentence to the specific needs and characteristics of the defendant. *See* 18 U.S.C. §§3563(b) & 3583(d). Conversely, "sentencing judges have no authority to order the Bureau of Prisons to place a defendant in any given rehabilitative program that

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[6] *See* F.R. Palmer, *Mood and Modality* 2 (1986) (noting that modality is not just a verbal category but a grammatical characteristic of the entire sentence).

might be offered, though they may offer recommendations." *United States v. Manzella*, 475 F.3d 152, 158 (3d Cir. 2007). This allocation of power shows that Congress intended courts to address rehabilitative concerns through probation and supervised release, not prison.

B. Amicus' Interpretation Conflicts with Congress' Directive to the Sentencing Commission.

The Act requires the Sentencing Commission ("Commission") to "insure [sic] that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional *treatment*." 28 U.S.C. §994(k) (emphasis added). Section 3582 should be read consistently with §994(k). Allowing judges to impose prison-for-treatment cannot be reconciled with requiring them to abide by mandatory guidelines that bar rehabilitative imprisonment. Amicus' reading of §3582(a) as permitting imprisonment for correctional treatment cannot be squared with the categorical language of §994(k).

C. Amicus' Exception to §3582 Swallows the Rule.

Moreover, allowing judges to consider rehabilitation when a defendant may benefit from a "targeted

treatment program" creates an exception that swallows the rule. By exhibiting drug dependence or abuse, nearly half of all federal prisoners might qualify for treatment. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Drug Use and Dependence, State and Federal Prisoners, 2004* tbl. 5 (Oct. 2006) (45.5% of federal prisoners exhibit drug dependence/abuse). The portion of prisoners who reported using drugs "regularly" is even higher. *See id.* tbl. 2 (64.3% reported using drugs at least once a week for at least a month). Even without adding in alcohol abusers, at least one-half to two-thirds of custodial sentencing decisions involve defendants who might benefit from drug treatment alone. The exception Amicus reads into the overtly categorical ban in §3582(a) thus extends to the majority of the prison-eligible defendants in federal courts.

D. Statutory Context and Structure Support Petitioner's Interpretation.

Amicus claims that Petitioner's reading of "the subordinate 'recognizing' clause . . . undercut[s] the main clause by forbidding a judge to lengthen a prison sentence to facilitate a defendant's entry into a treatment program." AC:22 (also stating that Petitioner's analysis puts the clauses "at war with each other"). It does not. As Petitioner reads the statute, a need for rehabilitation must be considered when deciding whether to imprison, and for how long; but this need will counsel only against incarceration or in favor of a shorter term, not the converse. Rehabilitation

is considered, but it points only one way. The same is true for other considerations. A need for incapacitation will point only toward imposing or increasing imprisonment. That §3582(a) constrains a judge's consideration of rehabilitation is not surprising. The entire Act directs and constrains a judge's previously unlimited sentencing discretion.

Beyond this, it is common that legislation contains general, guiding principles limited by later provisos. *See, e.g.*, 18 U.S.C. §3553(a)(4)(A)(ii); (a)(5)(B); (b)(1); (c)(2) (all including exceptions/conditions on more general procedures). Indeed, the same sentence in §3582(a) limits its directive to consider the factors set forth in §3553(a) by requiring that courts both 1) recognize prison does not promote rehabilitation and 2) apply the §3553(a) factors "only to the extent they are applicable." 18 U.S.C. §3582(a). Such provisos condition and tailor general principles; it is inaccurate to describe them as "undercutting" the broader rule. This pattern of legislative drafting is so common that it gives rise to a familiar canon of statutory construction: "a more specific statute will be given precedence over a more general one. . . ." *Corley v. United States*, 129 S. Ct. 1558, 1568 (2009) (quotation omitted).

There is no incongruity that requires the two parts of the sentence to be "harmonize[d]." AC:23. The conflict is imaginary, arising out of Amicus' assertion that Congress wanted to exempt "targeted treatment programs" from its ban on rehabilitative imprisonment. On the other hand, directing sentencing judges to acknowledge that incarceration does not rehabilitate

while allowing them to impose or lengthen imprisonment to further rehabilitation is not merely disharmonious, it is outright contradictory. PB:26-27. It is difficult to conceive that Congress could have expected judges to embrace such a contradiction without, at least, identifying this exception for "targeted treatment" and explaining how it differs from the treatment modes rejected with passage of the Act.

Amicus also argues that any limitation on using *imprisonment* to rehabilitate would be inconsistent with legislative intent because, in 18 U.S.C. §3553(a)(2)(D), Congress cited rehabilitative needs as a factor in determining a defendant's overall *sentence*. *See* AC:26-32. Amicus confuses "sentence" with "imprisonment" and misunderstands "consider." Federal judges have multiple sentencing options: fines, probation, imprisonment, supervised release, restitution, and forfeiture. Judges must consider rehabilitation in relation to each of the statutory sentencing options: probation, fines, and imprisonment. In considering imprisonment, the need for rehabilitation will militate only in favor of no or less imprisonment. That this factor points always away from incarceration does not mean it is not considered. Thus, there is no disharmony between the mandatory sentencing factors in §3553(a) and §3582's limitation on the manner in which rehabilitation may be considered. AC:26.

By confounding these various sentencing options, Amicus ignores the very real differences between custodial and non-custodial sentences, treating prison

as if it were just the incidental venue for a treatment program. *See* AC:22 ("When a judge lengthens a sentence to allow participation in a targeted treatment program, it is the treatment program, not 'the act of confining a person' . . . that is the means of promoting rehabilitation."). It is a nice semantic distinction, but it misunderstands the Act, which allows judges to sentence defendants only to *prison*, not to *prison programs*. *See* AC:28 (stating the district court here "chose" an in-prison treatment program for Petitioner). That is why, despite the trial court's wishes, Petitioner sits in prison, without access to the recommended program. PB:42-45; SB:29-30.

Amicus claims that a rehabilitation ban in §3582(a) undermines the incapacitation goal in §3553(a)(2)(C), stating that it would force judges who doubt eventual rehabilitation to "lengthen their sentences to protect the public." AC:29. The logic of Amicus' imaginary judge would need be: "Prison rehabilitates; at the end of X term, the offender will be rehabilitated, and incapacitation will be unnecessary." Such reasoning is premised on a rejection of the principle Congress required judges to accept, that imprisonment is not an appropriate means of rehabilitating offenders. A sentencing judge who acts as Amicus describes defies the will of Congress.

Moreover, Amicus' reasoning would only invite speculative trade-offs between rehabilitation and incapacitation in setting prison terms to qualify for programs – programs that may never be available to the defendant. That adds up to more uncertainty,

unwarranted disparity, and arbitrariness, not less. As Amicus observes, the intent of the Act was to reduce these. AC:26.

Amicus also argues that Petitioner's approach deprives judges of the flexibility the Act intended, AC:30-31, 53, prevents judges and the Commission from adjusting to evolving knowledge, AC:31, and creates potential unfairness. AC:31-32. The breadth and detail of conditions Congress made available to a judge designing a non-custodial sentence address flexibility concerns far better than the imprison-and-hope-she-gets-the-program method Amicus extols. Because neither a district judge nor the Sentencing Commission controls availability of programs in federal prisons, a prison-rehabilitation ban does not prohibit either from acting on new knowledge, consistent with limits set by Congress.[7] Finally, as regards certainty and fairness, AC:31-32, this case shows that the only certainty in imposing extra prison time to qualify Petitioner for treatment is that she will indeed serve that extra time, despite not being enrolled in the program. It is difficult to see the fairness in that.

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[7] It may be that new knowledge will lead in the future to a reversion to the former indeterminate-sentencing model, *see* Bill Von Sternberg, *Bill Seeks to Keep Sex Offenders Jailed*, Minneapolis Star Tribune, http://www.startribune.com/politics/statelocal/118054904.html (Mar. 15, 2011) (reporting state effort to move to indeterminate criminal sentences for certain sex offenders), but certainly a judge cannot defy the present scheme of determinate sentencing, even if convinced it is a failure.

III. Legislative History.

A. The Rehabilitative Model of Isolation, Silence, Routine, and Work Died in the Nineteenth Century. The Targeted Treatment Regime Amicus Proposes Is the Model That Congress Rejected.

Amicus posits that, in requiring judges to "recognize imprisonment is not an appropriate means of promoting rehabilitation," Congress insisted only that courts acknowledge the failure of the "rehabilitative ideal," the "amorphous hope of reforming every convicted criminal's soul through isolation and prison routine." AC:11. In making this argument, Amicus relies on his understanding of the history of the penitentiary and his belief that the rehabilitative ideal rejected by Congress was that "amorphous hope." History shows that this "amorphous hope" had died a century before Congress took up sentencing reform and that it was an approach identical to Amicus' "targeted treatment" regime against which Congress legislated.

The rehabilitative ideal Amicus describes, an ideal which relied on isolation, silence, routine, and work to reform the prisoner's soul, was abandoned a century ago. *See generally* David J. Rothman, *Perfecting the Prison, United States, 1789-1865, in The Oxford History of the Prison* 100, 112-14 (Norval Morris & David J. Rothman, eds., 1998); Lawrence M. Friedman, *Crime and Punishment in American History* 82, 156-59 (1993).

Through successive waves of prison reform, the rehabilitative model evolved from its original understanding. Edgardo Rotman, *The Failure of Reform, United States 1865-1965, in The Oxford History of the Prison* at 152-71; Friedman, 159-63. By the 1950s, the prevailing corrections philosophy was that rehabilitation could be achieved through "treating" the "sick" offender. Treatment programs multiplied. These included group therapy, individual therapy, educational remediation, vocational training, and narcotics addiction treatment. Rotman, 169-71; *see also* James Robison and Gerald Smith, *The Effectiveness of Correctional Programs*, 17 Crime and Delinquency 67, 68 (1971); Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, 35 Public Interest 22, 29-33 (1974). The model of the postwar era was one of coercive rehabilitation: Prisoners were reformed, not by silence, isolation, routine, and work, but by participation in treatment programs. S. Rep. No. 98-225, at 40 (1983), *as reprinted in* 1984 U.S.C.A.A.N. 3182 ("Senate Report"). It was this model of reform through prison-based rehabilitation programs that Congress rejected with the Act. Amicus' reading turns this history, and the Act, on its head.

Congress rejected a system of prison-based treatment because it doubted its worth and suspected that it was used as a rationale to imprison disproportionately the poor and minorities. By the 1960s, a backlash against the prevailing correctional treatment model was born. From the mid-1960s through 1975, as the homicide rate more than doubled from

4.6 to 9.4 per 100,000, this backlash grew. James Alan Fox & Marianne W. Zawitz, Bureau of Justice Statistics. U.S. Dep't of Justice, *Homicide Trends in the United States: 2002 Update* 1 (2004). Increasingly, academic criticism of these prison-based programs questioned their efficacy. *See* Senate Report 40 n.16. In 1974, researchers employing meta-analysis assessed all evaluations of criminal rehabilitation programs between 1945 and 1967, concluding: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." D. Lipton, et al., *Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975). By the late 1970s, the *cri de coeur* of the system's academic critics was "nothing works." Martinson, 40. Another set of critics complained that the poor and minorities were unnecessarily incarcerated with the hope that prison-based treatment programs would aid their reformation. *See* Senate Report 171 & n.408.

These critics' views drove Congress' rejection of the rehabilitative model. It is their criticisms Congress cites in abandoning this model: "[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." *Id.* 38; *see also id.* 40 & n.16. The system Congress rejected is this system in which imprisonment is designed to rehabilitate and freedom is

obtained through successful completion of prison-based treatment programs. *Id.* 40.

Congress' rejection of this model is emphasized by the repeal of its prior mandate for prison-based treatment. During the 1960s and '70s, the federal government's most prominent treatment program was drug treatment, made widely available through the Narcotics Addict Rehabilitation Act of 1966 ("NARA"). *See* 18 U.S.C. §§4251 *et seq*. This statute required a court finding an "eligible offender" to be an addict and "likely to be rehabilitated through treatment" to sentence that offender to the custody of the Attorney General for treatment. Senate Report 118-19. The Act repealed NARA. *See* Pub. L. No. 98-473, tit. II, §218(a)(6), 98 Stat. 1837, 2027 (1984). Congress' repeal of NARA cannot be reconciled with a view that it intended to allow judges to incarcerate people to make treatment available (if BOP grants it). Amicus has offered no meaningful distinction between the treatment programs Congress rejected and those which Amicus espouses. And appending the adjective "targeted" to these programs' descriptions does not provide it. Congress did the opposite of what Amicus proposes. It banned imprisonment-for-treatment and shifted mandatory participation in treatment programs and attention to rehabilitative concerns to non-incarceration sanctions, probation and supervised release. Only with regard to these sanctions did Congress give judges power to impose participation in treatment programs as a condition of freedom.

B. Congress Intended That Rehabilitative Needs Would Never Justify Imprisonment.

Amicus also argues that, even if an offender's need for treatment cannot *alone* justify imposing or increasing a term of imprisonment, in combination with other factors, it may. Amicus derives support for this argument from a misreading of legislative history. As discussed in Petitioner's opening brief, Congress intended that imprisonment would serve purposes of retribution, deterrence, or incapacitation, not rehabilitation, and where rehabilitation is a court's primary aim, it will choose an option other than incarceration. PB:53-57. But Congress did not intend that an offender who deserves imprisonment, whether for retribution, deterrence, or incapacitation, would necessarily avoid prison because he also needed rehabilitation. So Congress did not ban the use of incarceration whenever rehabilitation is a court's primary concern. If a need for retribution, deterrence, or incapacitation justifies imprisonment, Congress allowed a court to impose it, Senate Report 119, but the court may not impose or lengthen imprisonment to further rehabilitation. *Id.* 76, 119, 176. Misreading language which recognizes this principle, Amicus finds support for the idea that Congress believed incarceration for rehabilitative purposes could be appropriate.[8] *See, e.g.*, AC:49 ("Congress discouraged

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[8] Amicus also incorrectly argues that "Petitioner concedes that it 'may seem more natural' to read [28 U.S.C.] §994(k)'s legislative history as forbidding 'the imposition of imprisonment

(Continued on following page)

imprisonment 'on the *sole* ground' of correctional treatment, where rehabilitation is '*the* purpose of sentencing' or 'the *only* appropriate purpose of sentencing.'") (quoting Senate Report 91, 92, 119) (emphasis added by Amicus). Amicus misunderstands these words by viewing them in isolation, without reference to Congress' understanding that courts were authorized to impose imprisonment whenever a need for retribution, deterrence, or incapacitation justified it. In light of this principle, it would have been illogical for Congress to state without qualification that, if the primary purpose of sentencing is rehabilitation, the court must impose a non-prison sentence.

In her opening brief, Petitioner described how, in revising legislation that would become the Act, Congress eliminated provisions which would have allowed rehabilitative incarceration. Petitioner and the Government argue this demonstrates the legislature's intent to ban completely this practice. PB:57-59; SB:33-34. Amicus disagrees, arguing that Congress' intent in deleting this provision was merely to eliminate the option of indeterminate sentencing, not the

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only when rehabilitation is the "sole" purpose that incarceration would serve.'" AC:46. The language Amicus selectively quotes from Petitioner's brief discusses a single sentence in the Senate Report and concludes that it is ambiguous because, while a reading that this one sentence means Congress intended to bar imprisonment only when rehabilitation is its sole justification is natural, the whole of the Act's legislative history supports the opposite conclusion. PB:50 n.33.

use of imprisonment for rehabilitation. AC:37. Amicus is wrong, for, in Congress' view, the two were bound tightly together: S. 1437, 95th Cong., 1st Sess. (as reported by S. Comm. on the Judiciary, Nov. 15, 1977) would have allowed a partially indeterminate prison sentence *if* the judge found the defendant's participation in a specific type of rehabilitation program served a sentencing purpose and the *sole* way to make that program available was through imprisonment. S. Rep. No. 95-605, 95th Cong., 1st Sess. 883 (1977); *see also id.* 929. Indeterminate sentencing would not have been available except in this instance.

The Judiciary Committee report on S. 1437 confirms, first, that Congress understood a need for rehabilitation generally would not justify imposing or increasing a prison sentence to further rehabilitation, and, second, that it viewed this provision as the only portion of the bill under which a judge could do that:

> The Committee recognizes that the purpose of rehabilitation is not currently thought to be sufficient in most cases as the sole purpose of a sentence to a term of imprisonment or, where there are other reasons for imprisonment, such as deterrence or incapacitation, to be a fair basis for determining the length of a term of imprisonment. . . . The purpose of rehabilitation is still important in determining whether a sanction other than a term of imprisonment is appropriate in a particular case. The Committee in no way means to suggest that we should abandon our efforts to rehabilitate prisoners. On the

> contrary, the Committee views rehabilitation as a proper purpose of criminal sanctions other than imprisonment. In addition, there is limited authority for the Sentencing Commission to provide a partially indeterminate sentence to a term of imprisonment if the judge finds that a purpose of sentencing is served by the defendant's participation in a specific type of rehabilitation program and the sole way to make that program available to the defendant is through imprisonment.

Id. at 891-92. A need for rehabilitation or treatment might militate against incarceration, but it could not justify imposing or increasing imprisonment – except under this one limited exception to the general rule. When the 96th Congress did away with the exception, it banned both indeterminate sentencing and imprisonment for rehabilitation. *See* S. 1722, 96th Cong., 1st Sess. (1979).

Other actions of the 96th Congress confirm that it intended to ban absolutely imprisonment for rehabilitation. That Congress moved language directing courts to recognize the inappropriateness of imprisonment for rehabilitation from a section addressing general purposes of sentencing to one addressing specifically imprisonment. As introduced, that language was not absolute. It read:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length, shall consider the factors set forth in section 2003(a) to the extent that

> they are applicable, recognizing that imprisonment is *generally* not an appropriate means of promoting correction and rehabilitation.

S. 1722 §2302 (emphasis added).

When the Judiciary Committee reported S. 1722, it struck the word "generally." S. 1722, 96th Cong., 2nd Sess. (as reported Jan. 17, 1980). *See* App. 2. In doing so, Congress made the prohibition not "general" but absolute. This absolute ban was carried forward unchanged into S. 1762, 98th Cong., 1st Sess. (1983) and eventually into the Act. Together with deletion of the provision allowing a court to imprison an individual so that he might participate in a specific correctional program, this striking of the word "generally" makes clear that Congress intended to do away entirely with the use of imprisonment for rehabilitative purposes.

Amicus further argues that the legislative history supports its view because, in another bill, S. 1555, 97th Cong., 1st Sess. §102(a) (1981), Congress considered and rejected language banning rehabilitative incarceration in terms clearer than those in §3582. AC:38-39. As discussed elsewhere, the language of §3582 is clear in banning rehabilitative imprisonment. That Congress could have been more clear has no relevance in determining the meaning of a statute that is, on its face, clear. *See Manzella*, 475 F.3d at 160. But beyond this, Amicus is simply wrong in contending that Congress considered and rejected

S. 1555's ban on rehabilitative punishment. The bill was indeed introduced by Senator Kennedy. But the Congressional Record nowhere reflects that the bill was reported by the Judiciary Committee, let alone considered and rejected by the House or Senate. The failure of Congress to enact the language of S. 1555 is thus no evidence of its views.

Amicus also contends that Congress' creation and support of prison-based drug-treatment programs evinces its intention to allow courts to consider such programs in imposing or lengthening prison sentences. AC:39-43. The short answer to this is that Congress created these programs through the Violent Crime Control and Law Enforcement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4913 (1990) (codified as amended at 18 U.S.C. §3621(b)). That occurred some six years after passage of the Act. The actions of another Congress, years later, reveal nothing about the intent of the legislature in passing the Act. *See United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *see also United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring in part and concurring in judgment) ("[T]he will of a later Congress that a law enacted by an earlier Congress should bear a particular meaning is of no effect whatever. The Constitution puts Congress in the business of writing new laws, not interpreting old ones."); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative

history, like arguments based on antecedent futurity, should not be taken seriously not even in a footnote."). The Congress that passed the Act repealed NARA, 18 U.S.C. §§4251 *et seq.*, which required judges to incarcerate addicts for treatment. *See* Pub. L. No. 98-473, tit. II, §218(a)(6), 98 Stat. 1837, 2027 (1984). This is far more relevant evidence of Congress' view of the propriety of incarcerating offenders to allow their participation in prison-based treatment.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

Calendar No. 587

96TH CONGRESS
1ST SESSION **S. 1722**

[Report No. 96-553]

To codify, revise, and reform title 18 of the United States Code; and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 7 (legislative day, JUNE 21), 1979

Mr. KENNEDY (for himself, Mr. THURMOND, Mr. HATCH, Mr. DECONCINI, and Mr. SIMPSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JANUARY 17 (legislative day, JANUARY 3), 1980

Reported by Mr. KENNEDY, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

To codify, revise, and reform title 18 of the United States Code; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Code Reform Act of 1979".

* * *

"CHAPTER 23 - IMPRISONMENT

"Sec.

"2301. Sentence of Imprisonment.

"2302. Imposition of a Sentence of Imprisonment.

* * *

"§ 2302. Imposition of a Sentence of Imprisonment

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT. – The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 2003(a) to the extent that they are applicable, recognizing that imprisonment is ~~generally~~ not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

* * *

AMICUS CURIAE BRIEF

No. 10-5400

In The Supreme Court of the United States

ALEJANDRA TAPIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does 18 U.S.C. § 3582(a) allow a district court, when setting the length and term of imprisonment, to consider an individual defendant's need for an in-prison drug treatment program?

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INTEREST OF *AMICUS CURIAE*

On January 10, 2011, this Court invited Stephanos Bibas "to brief and argue this case, as *amicus curiae*, in support of the position that 18 U.S.C. § 3582(a) allows district courts to consider rehabilitative need in setting the length and term of imprisonment." This brief responds to that invitation.[1]

STATEMENT OF THE CASE

I. Statutory Background of the Sentencing Reform Act

Congress enacted the Sentencing Reform Act to repudiate the discredited belief, known as the rehabilitative ideal, that prisons could reform all criminals merely by isolating them from society. The nineteenth-century policymakers and activists who established America's penitentiary system believed that isolation and regimented prison routines would induce penitence and spiritual renewal. The criminal justice system pursued this goal through sentencing procedures known as the Rehabilitation Model. This Model left judges with standardless sentencing discretion, gave parole boards the power to determine

[1] No counsel for a party authored any part of this brief, and no person other than *amicus*, his employer (the University of Pennsylvania Law School), and his cocounsel made a monetary contribution to fund its preparation or submission.

ultimate release dates based on their subjective assessments that inmates had been reformed, and lacked meaningful appellate review.

In enacting the Sentencing Reform Act of 1984, Congress rejected the rehabilitative ideal and the notion that the "only way to rehabilitate a convict was 'to turn the mind in upon itself [and] awaken remorse.'" Adam Jay Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* 60 (1992) (quoting directors of an early nineteenth-century Massachusetts prison). The Act also rejected the Rehabilitation Model's opaque, unguided procedures for sentencing judges and parole boards. But it expressly sought to leave judges "sufficient flexibility to permit individualized sentences," and it expressly preserved providing "needed . . . correctional treatment" as one of four purposes of sentencing. 28 U.S.C. § 991(b)(1)(B); 18 U.S.C. § 3553(a)(2)(D).

A. The Rehabilitative Ideal and the Rehabilitation Model's Indeterminate Sentencing Procedures

1. The Substantive Rehabilitative Ideal and Its Model's Procedural Pillars

a. Nineteenth-century policymakers believed that bad social influences caused crime and that all criminals were redeemable. They thought that if a wrongdoer was separated from his criminogenic environment and left in silence with a Bible to ponder the sinfulness of his crimes, he would become

penitent and reform himself. Thus, New York and Pennsylvania established the first penitentiaries. *See* Lawrence M. Friedman, *Crime and Punishment in American History* 77-80 (1993); David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* 75-78 (rev. ed. 1990); *see also* Gustave de Beaumont & Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application in France* 82-83 (Francis Lieber trans., S. Ill. Univ. Press 1964) (1833). The very words "penitentiary" and "correctional institution" reflect this faith in the ability of confinement, without more, to induce penitence and self-correction.[2]

Philadelphia's historic Eastern State Penitentiary embraced solitude most completely as the way to induce penitence, isolating inmates from all contact with one another day and night. Delegations from around the globe came to study it. Alexis de Tocqueville and Gustave de Beaumont described its perceived benefits of spiritual renewal for the inmate's soul:

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[2] Many corrections officials and activists believed that solitary confinement would "arous[e] remorse" for one's sins through the "painful monotony of self-contemplation." Hirsch at 60 (internal quotation marks omitted). Others put more faith in the power of silent labor to break bad habits and instill good ones. *Id.* at 61. By the 1830s, prisons blended silent labor and routine during the day with solitude at least at night. Friedman at 79.

> Thrown into solitude [the prisoner] reflects. Placed alone, in view of his crime, he learns to hate it; and if his soul be not yet surfeited with crime, and thus have lost all taste for anything better, it is in solitude, where remorse will come to assail him.
>
> . . .
>
> Can there be a combination more powerful for reform than that of a prison which hands over the prisoner to all the trials of solitude, leads him through reflection to remorse, through religion to hope . . . ?

de Beaumont & de Tocqueville at 55, 84. As prison populations burgeoned, strict silence and solitude proved too expensive to maintain, but the penitentiary system and the underlying rehabilitative ideal lived on.[3]

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[3] Later reformers embraced "indeterminate sentences [because they] provide[d] inmates with incentives to participate in [prison] activities that were reformative," especially academic and trade classes and counseling by social workers. Edgardo Rotman, *The Failure of Reform: United States 1865-1965*, *in The Oxford History of the Prison* 151, 155, 161-62 (Norval Morris & David J. Rothman eds., 1998). These were generic activities for all inmates, not tied to a diagnosis of a particular inmate's pathology or addiction. These activities continued indefinitely until an inmate proved that he had reformed himself. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 40 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3223 [Senate Report] (committee report to the Sentencing Reform Act of 1984) (rejecting the "t[ying of] prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons").

b. Corrections officials thought that the rehabilitative potential of isolation and prison routine depended on a Rehabilitation Model of sentencing procedures loose enough to let treatment continue until each inmate proved himself to be reformed. By the start of the twentieth century, the sentencing judge in each case imposed an indeterminate prison sentence within a broad range. *See Williams* v. *New York*, 337 U.S. 241, 248 (1949). Parole boards were charged with releasing each inmate from prison only after finding that he had reformed himself. *See id.* Few rules or procedures guided judges' and parole officials' exercise of that discretion. *See id.* at 247-51. "[P]arole officials' power to determine a sentence's duration was seen both as a valuable incentive to prison inmates to rehabilitate themselves and as a vehicle to permit 'experts' to determine when sufficient rehabilitation had occurred to warrant release from prison." Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 227 (1993); *see also* Rotman at 155, 159. The main limitations on confinement were not *ex ante* but *ex post*, based primarily on parole boards' tacit, subjective judgments rather than legal rules. *See* Marvin E. Frankel, *Criminal Sentences: Law Without Order* 47-48 (1972). Thus, these sentences were largely unreviewable on appeal. *See id.* at 82-84.

2. Criticisms of the Rehabilitation Model's Opacity, Inconsistency, and Unpredictability

By the mid-twentieth century, reformers lamented problems with both the rehabilitative ideal and the Rehabilitation Model. It had long become clear that simply locking inmates in cells was not enough to induce reform. *See* Friedman at 159. Some studies questioned whether rehabilitation was feasible as a general goal of sentencing. *See, e.g.*, Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, 35 Pub. Int. 22 (1974). The brunt of criticism, however, addressed not the feasibility of rehabilitation but "the debasement of the rehabilitative ideal in practical application." Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 56 (1981).

In particular, critics attacked the procedural shortcomings of the Rehabilitation Model of sentencing. First, indeterminate sentences were unpredictable and bred anxiety, as prisoners could never tell when they would be deemed cured and released. Andrew von Hirsch, *Doing Justice* xviii (1976). Second, sentencing judges did not have to state their reasons for imposing sentences, and their decisions were "in practical effect" not reviewable on appeal. Frankel at 39-46, 76-77. Finally, the Rehabilitation Model led to sentencing disparities that were "arbitrary, capricious, and antithetical to the rule of law." *Id.* at 23. Critics especially feared that paternalistic, biased judges were more likely to imprison poor and

minority defendants. *See id.* at 23-24, 42; Am. Friends Serv. Comm., *Struggle for Justice* 29-31, 41-43, 71-75 (1971).

In 1972, Judge Marvin Frankel, "the father of sentencing reform," published his influential criticism of the Rehabilitation Model's sentencing procedures. 128 Cong. Rec. 26,503 (1982) (statement of Sen. Edward Kennedy); Frankel, *supra*. He described federal sentencing authority as "almost wholly unchecked and sweeping" and "terrifying and intolerable for a society that professes devotion to the rule of law." Frankel at 5. He called for the creation of an administrative agency that would bring law to sentencing by developing formal guidelines for federal sentencing. *Id.* at 118-23.

Judge Frankel stressed that "[t]he great evil in [traditional] thinking [about the value of prison sentences] is the pair of false assumptions that (1) rehabilitation is *always* possible and (2) indeterminate sentences are *always* desirable." *Id.* at 98 (emphases in original). Notably, he did not reject targeted treatment programs, but only the "airy nonsense that everyone can be rehabilitated." *Id.* at 99. He excepted "specific kinds of defendants for whom we have plausible, if by no means certain, hopes of rehabilitation," including drug users, some sex offenders, and young offenders. *Id.* at 98. Judge Frankel endorsed programs such as the one at issue here, stating: "Unlike grand inanities about universal redemption, narcotics programs center upon a reasonably well-identified and defined species of pathology." *Id.* at 99.

B. The Sentencing Reform Act Rejected the Rehabilitative Ideal and the Rehabilitation Model

Judge Frankel's and other reformers' views quickly became influential. In the late 1970s, led by a bipartisan group of senators including Senator Edward Kennedy, Congress began to consider retreating from the rehabilitative ideal and the Rehabilitation Model. *See* Stith & Koh at 230-39. These efforts culminated in the Sentencing Reform Act of 1984. Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 *et seq.* and 28 U.S.C. § 991 *et seq.*).

1. The Act Established More Honest, Predictable Sentencing Procedures

The Sentencing Reform Act rejected the procedures of the "outmoded rehabilitation model." Senate Report at 38; *accord id.* at 40. The government correctly notes that, "in rejecting the rehabilitation model, Congress specifically rejected" using indeterminate sentences and parole to tie prison release dates to later proof of "'successful'" rehabilitation. U.S. Br. 11, 13, 27-29 (quoting Senate Report at 40). As the Senate understood, that Model gave parole boards "unfettered discretion" to set release dates only when they determined that an inmate was finally reformed. Senate Report at 38; *accord id.* at 40; U.S. Br. 28-29. It gave sentencing judges no meaningful guidance, leading to widely disparate sentences in similar cases. Senate Report at 38 & n.6.

And it authorized no meaningful appellate review. *Id.* at 38 & n.7.

The Sentencing Reform Act dramatically scaled back each of these three pillars of the Rehabilitation Model. It promoted "certainty and fairness in meeting the purposes of sentencing" by abolishing parole and requiring determinate sentences. 28 U.S.C. § 991(b)(1)(B); 18 U.S.C. § 3624(a). It thus moved power to set the length of prison terms from parole boards at the back end to sentencing judges at the front end. The Act also sought to end "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). It did so in part by creating the U.S. Sentencing Commission, which promulgates sentencing guidelines to govern district courts' discretion. *Id.* §§ 991, 994(a). The Act also did so by requiring judges to state their reasons for particular sentences on the record, and by authorizing meaningful appellate review. 18 U.S.C. §§ 3553(c), 3742(a), (b).

While the Act assailed sentencing disparities, it also sought to preserve "sufficient flexibility to permit individualized sentences." 28 U.S.C. § 991(b)(1)(B). Congress understood that the Commission and sentencing judges each have "discrete institutional strengths." *Kimbrough* v. *United States*, 552 U.S. 85, 89, 109 (2007). The Commission, as a rulemaking body, can create only "general sentencing practices" suited for "a heartland of typical cases." *Rita* v. *United States*, 551 U.S. 338, 348 (2007) (quoting 28

U.S.C. § 991(b)(1)(B)); *Koon* v. *United States*, 518 U.S. 81, 94 (1996); *see also Kimbrough*, 552 U.S. at 109. The sentencing judge, by contrast, is familiar with the individual defendant and the particulars of each case. "He is therefore 'in a superior position to find facts and judge their import under § 3553(a)' in each particular case." *Kimbrough*, 552 U.S. at 109 (quoting *Gall* v. *United States*, 552 U.S. 38, 51 (2007)). In applying the Commission's general guidelines to a particular case, the judge must consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). The judge may consider any "information concerning the [defendant's] background, character, and conduct" without limitation. *Id.* § 3661; *see also Pepper* v. *United States*, No. 09-6822, slip op. at 1 (U.S. Mar. 2, 2011). In each case, the judge must "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing set forth in 18 U.S.C. § 3553(a)(2). 18 U.S.C. § 3553(a). Unlike the Commission, a sentencing judge needs discretion to tailor the application of the guidelines to each case.

2. The Act Prescribed Four Purposes of Sentencing, Including Targeted Treatment Programs

The Sentencing Reform Act did more than just reject the Rehabilitation Model's arbitrary sentencing procedures. It also "outline[d] in one place the purposes of sentencing, describe[d] in detail the kinds of

sentences that may be imposed to carry out those purposes, and prescribe[d] the factors that should be considered in determining the kind of sentence to impose in a particular case." Senate Report at 50. In particular, the Act requires that judges, when imposing sentences,

> shall consider . . .
>
> . . .
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with *needed educational or vocational training, medical care, or other correctional treatment* in the *most effective manner*.

18 U.S.C. § 3553(a) (emphases added). Instead of limiting judges to one purpose or excluding another, this provision directs judges to weigh all four to the extent that they apply in a particular case. Congress rejected the rehabilitative ideal, the amorphous hope of reforming every convicted criminal's soul through isolation and prison routine. *See* Senate Report at 38-39. At the same time, it required judges to consider more practical concerns in suitable cases, such as

providing specific "educational or vocational training, medical care, or other correctional treatment" where specifically "needed." 18 U.S.C. § 3553(a)(2)(D).

Cross-referenced eighteen times, § 3553(a) is the heart of the Sentencing Reform Act, guiding decisions at almost every stage of sentencing. For each offense, the Sentencing Commission must "independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2)." 28 U.S.C. § 994(m). In each case, a federal probation officer or the Bureau of Prisons must provide at sentencing a presentence report with information pertinent to the § 3553(a) factors. 18 U.S.C. § 3552(b); Fed. R. Crim. P. 32(c)(1)(A)(ii). Sentencing courts must then look to the applicable § 3553(a) factors when they consider imposing probation, fines, imprisonment, or supervised release. 18 U.S.C. §§ 3562(a) (probation), 3572(a) (fines), 3582(a) (imprisonment), 3583(c) (supervised release). They must also consider § 3553(a) when deciding whether to terminate or revoke probation and whether to run sentences concurrently or consecutively. *Id.* §§ 3564(c), 3565(a), 3584(b). Finally, appellate courts must use the § 3553(a) factors as criteria when assessing a district court's departure from the applicable guidelines range. *Id.* § 3742(e)(3)(B)(i).

Section 3553(a)(2)'s four purposes of sentencing have assumed even greater importance in the aftermath of this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that the binding federal sentencing guidelines violated the

Sixth Amendment. *Id.* at 226-27 (Stevens, J., merits majority opinion). *Booker* thus changed the Sentencing Reform Act's structure by invalidating the guidelines' binding force, making them just one factor in sentencing, and inferring a more deferential standard of review. *See id.* at 245-46, 259-65 (Breyer, J., remedial majority opinion) (excising and severing 18 U.S.C. §§ 3553(b)(1), 3742(e)). Thus, in addition to considering the guidelines and other statutory factors, each sentencing judge must "tailor the sentence in light of" all four purposes of sentencing. *Id.* at 245-46; *see also Pepper*, slip op. at 26; *Gall*, 552 U.S. at 49-50.

Congress has continued to endorse targeted treatment programs as a purpose of prison sentencing. Since enacting the Sentencing Reform Act, it has repeatedly embraced treatment for "specific kinds of defendants for whom we have plausible, if by no means certain, hopes of rehabilitation." Frankel at 98. For example, Congress requires the Bureau of Prisons to "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. § 3621(b); *see also id.* § 3621(f)(1) (same, for sex-offender treatment). Congress requires federal prisons to make residential drug treatment available "for *all* eligible prisoners." *Id.* § 3621(e)(1)(C) (emphasis added). And it authorizes sentence reductions of up to one year to encourage inmates to complete the treatment program. *Id.* § 3621(e)(2)(B).

II. Procedural History

Amicus adopts the government's statement of facts and procedural history (U.S. Br. 2, 4-9), but supplements that statement by emphasizing the following three points.

1. Judge Moskowitz imposed the 51-month sentence within the guideline range after expressly weighing the four purposes of sentencing specified in 18 U.S.C. § 3553(a)(2). He sought to "deter [petitioner] from committing other criminal offenses" and "to protect the public from further crimes of the defendant." JA 26-27. He wanted the sentence to reflect the seriousness of alien smuggling and the dangerous way in which petitioner had committed that offense. *Id.* at 25-26. The judge also noted that petitioner's prior conviction was for possessing marijuana for sale and that "while she [was] out on bail, she was ready to engage in identity theft, she was using meth, and she was in possession of a sawed-off shotgun." *Id.* at 26-27. To justify imposing a sentence at the top of the applicable guideline range, he stressed that petitioner was "launching into a new criminal career while she was a fugitive." *Id.* at 27-28. A lower sentence, the judge stated, would not have sufficed to deter petitioner and permit treatment of her drug problem. *Id.* at 28.

In accordance with § 3553(a)(1), the sentencing judge considered petitioner's past and the possibility that her history of physical and sexual abuse contributed to her crimes. *Id.* at 24-27. Following the

Presentence Report's (PSR) suggestion, he recommended in-prison drug treatment in the hopes of preventing her from sliding back into crime. S JA 17; JA 26-27. That consideration influenced not only the length of petitioner's prison term, but also the judge's recommendation of the FCI Dublin prison because that facility offered the necessary treatment resources. JA 28.

2. The record at sentencing highlighted the link between petitioner's crimes and her drug use. When she was arrested six months after jumping bail, petitioner possessed methamphetamine paraphernalia and admitted using methamphetamine. S JA 6-7, 10; U.S. Br. 5. The judge could reasonably have concluded that her drug use had contributed to her jumping bail. In addition, petitioner's mother stated that petitioner had "used drugs off and on since her early teenage . . . years." S JA 16. Her mother attributed petitioner's crimes and neglect of her children to her drug use. *Id.* Because her crimes were linked to her drug addiction, the PSR recommended that petitioner take part in the Bureau of Prisons' 500-hour drug treatment plan, S JA 17, otherwise known as the Residential Drug Abuse Program (RDAP).

3. The sentencing judge's independent assessment of all of the § 3553(a)(2) factors led him to impose a sentence significantly lower than the government had recommended. The government had asked for a 63-month sentence, based in part on an enhancement for witness tampering. JA 16. The judge

found that a sentence of 51 months (46 months for alien smuggling plus five consecutive months for bail jumping) would suffice. JA 26-28. That term was a year shorter than the government had sought and within the guideline range of 41 to 51 months. The sentencing judge reiterated that the 51-month term was "the necessary sentence for *all* the reasons I stated, and it's the least sentence that can be imposed to effect *all* these reasons." JA 28 (emphases added).

SUMMARY OF ARGUMENT

The Sentencing Reform Act repudiated both the rehabilitative ideal's effort to reform every inmate's soul through isolation and prison routine and the Rehabilitation Model's arbitrary, indeterminate procedures. It did not, however, bar judges from considering treatment programs that target specific defendants' addictions or pathologies when imposing determinate prison sentences.

1. Sentencing judges may, indeed must, consider a defendant's need for a targeted treatment program as a factor in prison sentencing. The Act instructs judges to consider programs tailored to particular defendants' needs, distinguishing those treatments from the amorphous rehabilitative ideal. Here, the sentencing judge permissibly adjusted petitioner's prison sentence in part to facilitate treatment of her drug addiction.

a. 18 U.S.C. § 3582(a) instructs judges to consider the factors set forth in § 3553(a) while "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." Nothing in that text forbids considering a defendant's treatment needs at sentencing. Rather, the "recognizing" clause admonishes sentencing judges not to rely on discredited notions of reforming every inmate through indefinite incarceration. In warning against "imprisonment" as a "means of promoting rehabilitation," Congress cautioned against simply locking an inmate in a cell indefinitely to induce penitence. That instruction echoes Judge Frankel's indictment of the "airy nonsense that everyone can be rehabilitated." Frankel at 99.

When a judge tailors a prison term so that a defendant can enter a specific treatment program, it is the program – not imprisonment itself – that is the "means of promoting rehabilitation." The verb "recognizing" instructs judges to recall to mind and realize the failed history of the rehabilitative ideal, not targeted prison treatment programs.

b. The Act's stated purposes reinforce this understanding of § 3582(a)'s text. Section 3553 sets out four purposes of sentencing, including "provid[ing] the defendant with needed . . . correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). Unlike confinement itself, which is no longer "an appropriate means of promoting correction and rehabilitation," targeted "correctional treatment" specifically "needed" by a particular defendant

remains appropriate. *Compare id. with id.* § 3582(a). Congress would not have radically curtailed consideration of this express purpose of sentencing by inserting a subordinate clause in a different statutory provision many sections later. Unlike penitentiary-style indeterminate isolation, fixed terms of targeted treatment programs do not threaten the Act's goals of promoting certainty and avoiding unwarranted disparities in sentencing.

Likewise, the structure of the Act underscores that a sentencing judge, when imposing or lengthening a prison term, may consider a defendant's need for a targeted treatment program. In addressing supervised-release sentences, Congress instructed judges to consider deterrence, incapacitation, and needed correctional treatment, but specifically omitted retribution, the fourth general purpose of sentencing. *Id.* § 3583(c). Congress could easily have used similar phrasing in § 3582(a) but did not do so.

c. The legislative history of the Act reflects Congress's desire to retain the need for targeted treatment programs as a factor in prison sentencing. Congress considered a bill that would have limited consideration of targeted treatment programs to determining "a sentence *other than* a sentence to a term of *imprisonment*." S. 1555, § 102(a), 97th Cong., 1st Sess. (1981) (emphases added). But it declined to enact this provision.

d. Finally, Congress has endorsed and continued to support in-prison drug treatment programs,

which have proven to be effective means of treating drug addiction and reducing recidivism. Congress's support of these programs confirms that it wanted judges to consider drug treatment in prison sentencing decisions.

2. Even if the "recognizing" clause applies to means of rehabilitation beyond imprisonment per se, at most it discourages judges from relying solely on targeted treatment programs in prison sentencing. Section 3582(a) does not categorically bar this consideration; indeed, it encourages its use as one of several factors. Congress knew how to bar consideration of factors at sentencing and did so in another section of the same statute. 28 U.S.C. § 994(d) provides that the Sentencing Commission "shall assure that the guidelines and policy statements are entirely neutral as to . . . race, sex, national origin, creed, and socioeconomic status." Section 3582(a), by contrast, does not use such categorical, prohibitory language. While the Senate Report mentions that reliance on treatment as the *sole* basis for imprisonment is discouraged, the Act itself encourages judges to "balanc[e] all the relevant considerations," including targeted treatment programs. Senate Report at 119. Here, the sentencing judge permissibly balanced several considerations, including petitioner's demonstrated need for drug treatment, in imposing a prison term within the applicable guideline range.

3. The best reading of the Act allows judges to consider targeted treatment programs both in imposing terms of imprisonment and in determining their

length. But even if one reads the Act as forbidding consideration of targeted treatment programs in deciding whether to impose a prison sentence at all, judges may still consider them in setting a prison term's length. The directive to the Sentencing Commission not to rely solely on rehabilitation in creating guidelines applies only to "imposing a sentence to a term of imprisonment" and not to adjusting the length of a term. 28 U.S.C. § 994(k). Thus, once any other purpose of sentencing "authorize[s]" imposing a prison sentence, judges may "balanc[e] all the relevant considerations," including targeted treatment programs, in determining the prison term's length. Senate Report at 119.

4. The statute is clear, so the rule of lenity does not apply. The rule is particularly inapposite here because petitioner had fair warning of the sentence she received, which fell within the applicable guideline range.

ARGUMENT

I. A Sentencing Judge May Consider a Defendant's Need for a Targeted Treatment Program in Imposing a Prison Term and Setting Its Length

A. The Text of 18 U.S.C. § 3582(a) Allows a Judge to Consider a Defendant's Need for a Targeted Treatment Program

When interpreting a statute, this Court begins with its text. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). Under 18 U.S.C. § 3582(a), the sentencing court, "in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that *imprisonment* is not an appropriate means of promoting correction and rehabilitation" (emphasis added). This text warns judges to "recogniz[e]" the failure of the rehabilitative ideal. In light of that historical lesson, imprisonment itself is "not an appropriate means" of rehabilitating. That clause says nothing about using targeted treatment programs to address the specific needs of particular defendants.

1. "[I]mprisonment" means primarily "[t]he act of confining a person, esp. in a prison" and secondarily "[t]he state of being confined; a period of confinement." *Black's Law Dictionary* 773 (8th ed. 2004); *see* 7 *Oxford English Dictionary* 746 (2d ed. 1989)

("The action of imprisoning, or fact or condition of being imprisoned . . . ."); Pet'r Br. 21-22; U.S. Br. 17-18.

The text mentions "imprisonment" per se, not targeted treatment programs in prison. Section 3582(a) thus cautions sentencing judges against the rehabilitative ideal's faith that isolation and prison routine by themselves will lead inmates to repent. Congress realized that merely warehousing inmates indefinitely does not reform them.

But the "recognizing" clause does not address targeted treatment programs that are available in prison. When a judge lengthens a sentence to allow participation in a targeted treatment program, it is the treatment program, not "the act of confining a person" or "the state of being confined," that is the means of promoting rehabilitation. A judge may consider that such programs may be useful in treating an individual inmate's specific needs.

Petitioner and the government, however, put the two clauses of § 3582(a) at war with each other. The main clause of § 3582(a) requires sentencing judges to "consider" the four purposes of sentencing in § 3553(a)(2), including the defendant's need for targeted treatment programs, in imposing or setting the length of a prison term. Yet petitioner and the government read the subordinate "recognizing" clause as undercutting the main clause by forbidding a judge to lengthen a prison sentence to facilitate a defendant's entry into a treatment program. They read the subordinate clause as carving out a massive exception, as

if it expressly said: "except that judges shall not consider needed education or vocational training, medical care, or other correctional treatment in imposing or lengthening a prison term." But that is not the language that Congress used.

The subordinate "recognizing" clause does not undercut the main clause but complements it. Rather than forbidding consideration of targeted treatment programs, the subordinate clause warns judges not to confuse "imprisonment" by itself with "appropriate means of promoting correction and rehabilitation," namely targeted treatment programs. This reading harmonizes the subordinate clause (which forbids the former) with the main clause (which expressly authorizes the latter). The two clauses, in short, differentiate the forbidden rehabilitative ideal from permissible treatment programs.

2. Congress chose the word "recognizing" to remind judges of the failure of the rehabilitative ideal. The word "recognizing" would be a peculiar way to impose a ban, but it makes perfect sense as a reminder and warning to judges. Congress cautioned judges not to confuse "grand inanities about universal redemption" with the statute's more specific and practical approach to treatment. Frankel at 99.

"Recognizing" derives from the Latin "recognoscere," which means "[t]o know again," "recollect," or "recall to mind." 13 *Oxford English Dictionary* at 343; *Webster's Third New International Dictionary* 1896 (1981) [*Webster's Third*]; *Random House Dictionary of the*

English Language 1611 (2d ed. 1987) [*Random House*]; Charlton T. Lewis & Charles Short, *A Latin Dictionary* 1534 (1966); *see also Oxford Latin Dictionary* 1583 (2d ed. 1982). Dictionaries define "recognize" as "to identify as something or someone previously seen [or] known"[4] and to "realize" or "perceive clearly."[5]

Congress chose the word "recognizing" to guide sentencing judges' *cognitive* processes. Judges must re*cognize* – "recall to mind," "realize," or "perceive clearly" – the inappropriateness of imprisonment itself as a means of rehabilitation. They must recall the cautionary history of the rehabilitative ideal and the Rehabilitation Model of indefinite imprisonment.

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[4] *Random House* at 1611; *accord, e.g., Cambridge Dictionary of American English* 716 (2d ed. 2008); *Oxford Modern English Dictionary* 844 (2d ed. 1996); *The American Heritage Dictionary of the English Language* 1509 (3d ed. 1992); *Webster's New International Dictionary* 2079 (2d ed. 1949) (including "to recover or recall knowledge of").

[5] *Webster's Third* at 1896 (listing first non-obsolete definition as "to recall knowledge of : make out as or perceive to be something previously known," followed by "to perceive clearly : be fully aware of : REALIZE"); 13 *Oxford English Dictionary* at 343 (listing second non-obsolete definition as "[t]o know again; to perceive to be identical with something previously known," followed later in the same definition by "[t]o perceive clearly, realize").

In an effort to transform the "recognizing" clause into a categorical bar, the government defines "recognizing" to mean "to admit the fact, truth, or validity of." U.S. Br. 18 (quoting *Webster's Third* at 1896 (listing this definition as obsolete)). That definition is consonant with recalling it to mind as discussed above.

The instruction guides judges' cognition about the sentencing process as they "consider the factors set forth in section 3553(a)." 18 U.S.C. § 3582(a). It is phrased not as a categorical ban but as a warning. Before the Sentencing Reform Act, judges had long confused isolation and prison routine with treatment and needed to be reminded not to repeat the error. Now, judges must recognize the difference between forbidden indeterminate, penitentiary-style isolation and determinate treatment programs targeting specific pathologies. Only the latter remain permissible "means of promoting correction and rehabilitation." *Id.*

B. The Sentencing Reform Act's Purposes and Structure Support Consideration of Targeted Treatment Programs

Section 3553(a)(2)(D) of the Sentencing Reform Act expressly preserves the provision of targeted treatment programs as a central purpose of sentencing. Congress would not have hobbled this purpose by inserting an oblique subordinate clause into § 3582(a), an entirely separate provision of the Act.

The Act also sought to end the unpredictability, opacity, and unwarranted sentencing disparities created by the Rehabilitation Model. Fixed terms tailored to targeted treatment programs, however, do not threaten certainty or uniformity. Allowing judges to consider targeted treatment programs also promotes the Act's other purposes of individualizing sentences and remaining open to evolving knowledge.

Other provisions of the Act categorically ban consideration of other sentencing factors. Congress thus knew how to expressly ban consideration of certain factors, but chose not to do so with targeted treatment programs.

1. The Act Sought to Promote Certainty, Uniformity, and Individualization While Preserving Targeted Treatment Programs as a Purpose of Sentencing

a. The Sentencing Reform Act explicitly embraced the provision of targeted treatment programs as one of its four enumerated purposes of sentencing. "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a). These purposes include not only retribution, deterrence, and protection of the public, but also providing "needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Id.* § 3553(a)(2)(D). The sentencing judge "shall consider" each of these four purposes of sentencing "in determining the particular sentence to be imposed." *Id.* § 3553(a).

Section 3582(a) should be read in harmony with § 3553(a)'s command that a sentencing judge "shall consider" all four purposes of punishment in choosing a sentence appropriate to each case. *See* Senate Report at 119; *Booker*, 543 U.S. at 260 (Breyer, J.,

remedial majority opinion) (noting, in the context of reviewing a decision setting the length of a term of imprisonment, that judges must "impose sentences that . . . effectively provide the defendant with needed educational or vocational training and medical care"); *Rita*, 551 U.S. at 347-48 (same).

Consistent with this framework, the contrast in phrasing between § 3582(a) and § 3553(a)(2)(D) emphasizes that Congress rejected the rehabilitative ideal but embraced targeted treatment programs. The Act addresses two "means of promoting" rehabilitation: penitentiary-style isolation, on the one hand, and focused treatment programs for particular inmates' pathologies, on the other. Section 3582(a) cautions judges against equating "imprisonment" itself with "correction and rehabilitation." Indefinite isolation through imprisonment has proven to be ineffective and arbitrary and is not targeted to particular inmates' needs, so it "is not an appropriate means."

In contrast, § 3553(a)(2)(D) requires judges to consider focused interventions targeting specific pathologies or conditions: "educational or vocational training, medical care, or other correctional *treatment*" that is specifically "*needed*" (emphases added). This "means of promoting correction and rehabilitation" is very different from the indefinite isolation and generic prison routines of the rehabilitative ideal. Following Judge Frankel's approach, Congress disavowed penitentiary-style isolation but endorsed determinate terms that

facilitate treatments of specific pathologies. *Supra* pp. 7-8, 11-13.[6]

Section 3553(a)(2)(D) also calls upon judges to consider how to deliver "correctional treatment in the most effective manner." The sentencing judge could reasonably have doubted that petitioner, a bail jumper, would attend outpatient treatment faithfully or at all. He thus chose an intensive, in-prison residential treatment program as "the most effective manner" of treating her drug addiction and preventing her from committing more crimes.

b. Petitioner and the government argue that § 3582(a) creates an exception to § 3553(a)(2)(D) for sentences of imprisonment. This proposed exception, however, would swallow the rule. The vast majority of federal felons are sentenced to imprisonment. U.S. Sentencing Comm'n, *2009 Annual Report* 36 (2010) (89.6% in 2009); U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 43 fig.2.2 (2004) (roughly 64% in 1984 and roughly 70% when the Guidelines first took effect in 1987). Petitioner's and the government's interpretation of § 3582(a) would

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[6] The government's repeated citation of *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989), hardly illuminates the role of rehabilitation in setting prison terms under the Sentencing Reform Act. *See* U.S. Br. 9, 14. *Mistretta* was a separation-of-powers challenge to the U.S. Sentencing Commission and its sentencing guidelines. This Court was not faced with, and cannot be assumed to have resolved, the question presented here, concerning the role of targeted treatment programs in prison sentencing.

thus thwart consideration of targeted treatment programs in most federal sentencing decisions. It would prohibit judges in most cases from even considering targeted treatment programs in deciding whether to impose or lengthen a prison term. Pet'r Br. 8, 9, 44, 46, 51-53; U.S. Br. 9-13, 15, 27, 30, 32, 35. Having made targeted treatment programs a central purpose of sentencing in § 3553(a)(2)(D), and having repeatedly embraced in-prison drug treatment (*supra* p. 13 & *infra* pp. 40-41), Congress would not have slipped a massive limitation on its use into an oblique subordinate clause many sections later.

Moreover, petitioner's position would undermine not only § 3553(a)(2)(D), but also § 3553(a)(2)(C), which expresses the purpose of protecting the public from a defendant's further crimes. If judges cannot tailor prison sentences to promote treatment of dangerous criminals, those criminals may go untreated and will be more likely to recidivate after release. Judges may instead be forced to lengthen their sentences to protect the public. *See United States* v. *Story*, No. 09-6261, 2011 WL 590353, at *7 (10th Cir. Feb. 22, 2011) (Hartz, J., concurring) (noting that if a judge fears that an inmate will recidivate unless he receives treatment, "the judge may think that a longer sentence is appropriate to protect the public"); *see also Pepper*, slip op. at 14 (noting RDAP participation as a factor that reduced Pepper's need for deterrence and incapacitation); *infra* pp. 40 (discussing empirical evidence that in-prison drug treatment works). Here, for example, the judge feared that

petitioner posed a danger to the public because the officers who rearrested her found not only methamphetamine paraphernalia, but also a sawed-off shotgun. *Supra* p. 14.

c. Determinate terms tailored to targeted treatment programs are likewise consistent with the Act's other central purposes. First, the Act seeks to "maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). The Sentencing Commission creates only "general sentencing practices" suited for "a heartland of typical cases." *Id.*; *Koon*, 518 U.S. at 94. Individual sentencing judges must tailor the application of these rules to particular cases. In doing so, they "shall consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a). "No limitation shall be placed on the information concerning the [defendant's] background, character, and conduct" that a sentencing judge "may receive and consider for the purpose of imposing an appropriate sentence." *Id.* § 3661; *Pepper*, slip op. at 2.

The defendant's characteristics include her amenability to and specific need for targeted treatment programs. *See id.* § 3553(a)(2)(D). Thus, in appropriate cases, judges must take into account targeted treatment programs "to the extent that they are applicable." *Id.* § 3582(a). Petitioner's and the government's reading, however, would curtail considering

treatment needs in prison sentencing, undercutting § 3553(a)(2)(D) and § 3661 in the vast majority of cases.

Second, the guidelines must "reflect, to the extent practicable, advancements in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C); *accord* Senate Report at 161. The Senate Report repeatedly qualifies its disfavor of rehabilitative prison sentencing with the phrase "in light of current knowledge." *Id.* at 67 n.140, 76, 119. The Act envisions an iterative process in which the Commission periodically reviews and updates the guidelines in light of new data. 28 U.S.C. § 994(*o*); Senate Report at 178. "The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." *Rita*, 551 U.S. at 350; *accord* Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988) (explaining that "the system is evolutionary," using data from actual sentencing to "revis[e] the Guidelines over time"). That feedback loop requires that judges have latitude to adapt particular treatments to particular defendants' needs in order to learn what works. Foreclosing discretion in prison-based targeted treatment programs would prevent judges and the Commission from developing new, effective sentencing approaches.

Third, the Act promotes "certainty and fairness in meeting the purposes of sentencing" by abolishing

parole, indeterminate sentencing, and back-end release decisions. 28 U.S.C. § 991(b)(1)(B); 18 U.S.C. § 3624(a) (abolishing parole). Rehabilitation cannot continue indefinitely until an inmate is perhaps eventually cured. A determinate prison sentence that allows an inmate to participate in a treatment program for a fixed term, in contrast, comports with certainty and fairness.

Fourth, the Act seeks to "avoi[d] unwarranted disparities" by establishing sentencing guidelines and facilitating appellate review. 28 U.S.C. §§ 991(b)(1)(B), 994(a); 18 U.S.C. § 3742(a), (b). So long as judges consider the guidelines and justify their sentences subject to appellate review, targeted treatment for finite terms will not lead to unwarranted sentencing disparity. Here, petitioner's sentence was within the guideline range, further alleviating concerns about disparity.

2. The Structure of the Act Underscores the Appropriate Role of Targeted Treatment Programs

Another provision of the Sentencing Reform Act reinforces the conclusion that Congress did not intend to prevent judges from considering defendants' needs for drug or medical treatment in setting prison sentences. Congress knew how to forbid all consideration of a particular purpose of sentencing, as it did explicitly in a parallel section of the Act. It chose not to do so in § 3582(a).

The Act's four provisions governing the imposition of particular types of sanctions are nearly identical in structure and phrasing. Each instructs that "[t]he court," in deciding whether to impose a particular punishment and how much of it to impose, "shall consider" the § 3553(a) factors in varying formulations. 18 U.S.C. §§ 3562(a) (probation), 3572(a) (fines), 3582(a) (imprisonment), 3583(c) (supervised release).

This parallelism is unsurprising, since Congress debated and enacted the sections together as components of a single bill. Given the close parallels, differences in phrasing are presumably deliberate and significant, not accidental. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted) (alteration in original).

Section 3583(c), governing the imposition of supervised release, mirrors the structure of the other three provisions but prevents judges from imposing supervised release to serve the goal of retribution. "The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B) [deterrence], (a)(2)(C) [protection

of the public], (a)(2)(D) [targeted treatment programs], (a)(4), (a)(5), (a)(6), and (a)(7)." 18 U.S.C. § 3583(c). Notably, § 3583(c) omits any reference to § 3553(a)(2)(A), which directs sentencing judges to consider retribution. Under the expressio unius canon of construction, Congress's listing of the other three purposes precludes judges from considering retribution in supervised-release sentencing. *See* Senate Report at 124; *cf. Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (applying expressio unius canon).

Unlike § 3583(c), § 3582(a) does not clearly exclude or omit any of the § 3553(a) purposes of sentencing. If Congress had wanted to impose a similar ban on considering targeted treatment programs in prison sentencing, it would have used the exact language it used in the very next section. *Russello*, 464 U.S. at 23 ("Had Congress intended to [achieve a particular statutory result], it presumably would have done so expressly as it did in the immediately following subsection . . . ."). Or Congress would have enacted language found in S. 1555, a 1981 predecessor bill to the Act, which would have explicitly limited the purpose of providing targeted treatment programs to nonprison sentences. *Infra* pp. 38-39. "'The short answer'" to petitioner's and the government's attempt to read in this limitation "'is that Congress did not write the statute that way.'" *Russello*, 464 U.S. at 23 (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)).

C. The Legislative History Confirms the Propriety of Targeted Treatment Programs in Prison Sentencing

The main Senate Judiciary Committee report on the enacted legislation confirms that Congress intended to retain targeted treatment programs as one of the four purposes of sentencing, both generally and in prison sentencing. Congress chose not to enact a bill that would have authorized consideration of targeted treatment programs only in nonprison sentencing.

1. Congress explicitly rejected "arguments . . . that rehabilitation should be eliminated completely as a purpose of sentencing." Senate Report at 76. "Instead, the Committee . . . retained rehabilitation and corrections as an appropriate purpose of a sentence . . . ." *Id.*; *see also id.* at 50 (recognizing targeted treatment programs among the four "purposes of sentencing"). "[E]ach of the four stated purposes [of sentencing] should be considered in imposing sentence in a particular case." *Id.* at 68.

Though critics had debated whether there should be a presumption in favor of or against imprisonment, Congress avoided taking sides on that issue. "[I]nstead, [it] rel[ied] on the general purposes of sentencing" -- "deterrence, incapacitation, just punishment, and rehabilitation" – to guide decisions about "whether imprisonment in an individual case is appropriate or not." *Id.* at 122. This language in the committee report's section-by-section analysis of

§ 3582 embraces rehabilitation as a purpose of prison sentencing.

Far from rejecting in-prison targeted treatment programs, Congress encouraged using them "to enhance the possibility of rehabilitation." *Id.* at 76. Indeed, Congress believed that "because of the increased certainty of release dates, the bill should enhance prison rehabilitation efforts because prison officials will be able to work with prisoners to develop realistic work programs and goals within a set term of imprisonment." *Id.* at 57.

2. Petitioner and the government cite two predecessor bills to the Act: S. 1437, 95th Cong., 1st Sess. (1977) (as reported by the S. Comm. on the Judiciary Nov. 15, 1977), and S. 1722, 96th Cong., 1st Sess. (1980) (as reported by the S. Comm. on the Judiciary Jan. 17, 1980). Pet'r Br. 58-59; U.S. Br. 31-35. The first bill instructed the Commission to treat imprisonment as inappropriate "for the purpose of providing . . . correctional treatment, other than in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact." S. 1437, § 124 (proposed 28 U.S.C. § 994(j)). "It is only in those cases . . . that the guidelines may recommend a term of imprisonment *with the possibility of early release by the Parole Commission.*" S. Rep. No. 605, 95th Cong., 1st Sess. 1128 (1977) (interpreting S. 1437, § 124 (proposed 28 U.S.C.

§ 994(j)) (emphasis added).[7] Thus, in this first proposal, the exception for correctional treatment depended on back-end parole and its resulting indeterminacy.

The second bill eliminated that exception, making all sentences determinate and without parole. S. 1722, § 125 (proposed 28 U.S.C. § 994(j)); S. Rep. No. 553, 96th Cong., 2d Sess. 983-85 (1980).[8] This change did not bar judges from considering treatment programs in prison sentencing. *Contra* Pet'r Br. 58-59; U.S. Br. 33-34. It simply abolished the last vestige of the Rehabilitation Model's procedures. Its target was the rehabilitative ideal yoked to indeterminate sentences and parole boards (U.S. Br. 28-29), not focused treatment programs.

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[7] *See also id.* at 924-25, 929 (reading the "exceptional case" proviso as requiring "a specific reason for an indeterminate sentence" to justify "the rare exception" to "the rule" of determinate sentences (internal quotation marks omitted)); Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 Am. Crim. L. Rev. 353, 370 & n.76 (1979) (describing the "exceptional case" proviso quoted in the text as the only remnant of indeterminate sentencing in S. 1437); Stith & Koh at 241.

[8] *See also* Edward M. Kennedy, *Commentary – The Federal Criminal Code Reform Act and New Sentencing Alternatives*, 82 W. Va. L. Rev. 423, 431 & nn.34-35 (1980) ("Eventually, complete elimination of indeterminate sentences won out." (citing in the following footnote S. 1722, § 101 (proposed 18 U.S.C. § 2302(a)), the provision paralleling the current 18 U.S.C. § 3582(a))); Stith & Koh at 241-42.

Petitioner and the government nevertheless read this legislative history as progressively eradicating every kind of rehabilitation as a factor in prison sentencing. *See* Pet'r Br. 58-59; U.S. Br. 30-35. While Congress considered making rehabilitation irrelevant to prison sentencing, in the end it retreated from that extreme. S. 1555, a still later bill introduced by Senator Kennedy in 1981, would have limited consideration of targeted treatment programs to nonprison sentencing, yet Congress chose not to go that far. In proposed § 3579(a)(2)(D), the functional equivalent of what is now § 3553(a)(2)(D), S. 1555 phrased the treatment purpose of sentencing as follows:

> (a) The court, in determining the particular sentence to be imposed, shall consider –
>
> . . .
>
> (2) the need for the sentence imposed
>
> . . .
>
> (D) *with respect to a sentence other than a sentence to a term of imprisonment*, to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

S. 1555, § 102(a) (proposed 18 U.S.C. § 3579) (emphasis added).

Congress chose not to pass this version of the bill or to carry its categorical exclusion forward into the bill eventually enacted. Instead, the final bill directs

judges to recognize the inappropriateness of "imprisonment" per se, but not targeted treatment programs, as a "means of promoting . . . rehabilitation." 18 U.S.C. § 3582(a). By eliminating S. 1555's categorical exclusion, Congress rejected its blanket ban. *See Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 539 (1984) (noting that a decision by Congress not to include explicit language "strongly suggests" that courts should not read such language into the provision); *see also Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220 (1983) ("[I]t would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected."); *Busic* v. *United States*, 446 U.S. 398, 406 n.11 (1980).

D. Congress Has Endorsed In-Prison Drug Treatment as an Effective Program That Should Remain a Factor in Prison Sentencing

1. Several years after passing the Sentencing Reform Act, Congress manifested its dedication to providing drug treatment in prison. It required the Bureau of Prisons to "make available appropriate substance abuse treatment" to all prison inmates with addictions. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4913 (codified as amended at 18 U.S.C. § 3621(b)). Today, the Residential Drug Abuse Program (RDAP) is one of the Bureau of Prisons' most widely used and effective programs.

The penitentiary-style model of rehabilitation left inmates isolated so they could reform themselves through solitary contemplation. In contrast, inmates in RDAP are placed in a special housing unit "for the purpose of building a treatment community." Fed. Bureau of Prisons Office of Research & Evaluation, *TRIAD Drug Treatment Evaluation Project Final Report of Three-Year Outcomes: Part I*, at 5 (2000) [*TRIAD Final Report*]. Participants receive 500 hours of care over nine to twelve months, followed by up to twelve months' follow-up care in the general prison population and more follow-up care in a halfway house after release. *Id.* at 4-5.

The program's fixed length, focus on drug addiction, and proven effectiveness differentiate it from the rehabilitative ideal's amorphous, ineffective, and universal aspirations. RDAP participants are 15% to 18% less likely to recidivate or use drugs within three years after release and are significantly less likely to misbehave in prison. *Id.* at 3-4, 11-12; Neal P. Langan & Bernadette M.M. Pelissier, *The Effect of Drug Treatment on Inmate Misconduct in Federal Prisons*, 34 J. Offender Rehab. 21, 27 (2001). Congress considered the program so valuable that it authorized sentence reductions of up to one year to encourage inmates to take part. H.R. Rep. No. 320, 103rd Cong., 1st Sess. 4 (1993); 18 U.S.C. § 3621(e)(2)(B).

Congress continues to support RDAP and similar programs with an $87 million annual budget. *See* Exec. Office of the President, *National Drug Control Strategy FY 2011 Budget Summary* 115 (2010). In

fiscal year 2009, 18,732 inmates at 62 federal prisons participated in RDAP. Fed. Bureau of Prisons, *Annual Report on Substance Abuse Treatment Programs Fiscal Year 2009*, at 3, 7, 10 (2010). Congress thus views in-prison drug treatment as complementing rather than undercutting the Act's goals.

2. Congress valued drug treatment as a means of preventing recidivism. Releasing untreated addicts from prison, it saw, would "virtually guarantee future crime." H.R. Rep. No. 103-320, at 3. "Incarceration may offer the best opportunity for society to reach substance-abusing individuals who are committing other crimes." *Id.* Many inmates do whatever they can to enroll in RDAP, even occasionally requesting longer sentences to become eligible for RDAP treatment. *See, e.g.*, Def.'s Sentencing Mem. at 3, *United States* v. *Blumenfeld*, No. CR-06-267-S-BLW (D. Idaho May 1, 2007); *see also United States* v. *Hurt*, 345 F.3d 1033, 1036 (9th Cir. 2003) (denying defendant's request to lengthen sentence to maximize in-prison rehabilitation); *United States* v. *Keifer*, 12 F. App'x 702, 703-05 (10th Cir. 2001) (same).

Federal policy requires that participants ordinarily have at least twenty-four months left on their sentences when they begin RDAP. Bureau of Prisons, *Program Statement: Psychology Treatment Programs* P5330.11, ch.2, at 9 (2009). Waiting lists often lengthen this period. *See* Def.'s Sentencing Mem. at 3, *Blumenfeld* (requesting thirty-six-month sentence). Given the possibility of a one-year sentence reduction, increasing sentences a few months over

what is required for treatment can doubly benefit inmates, by making them eligible both for treatment and for early release.

3. Admittedly, sentencing judges cannot guarantee that any particular defendant will enter RDAP. U.S. Br. 29-30. Petitioner was not admitted to RDAP, nor even placed in the prison recommended by the district court.[9] Sentencing judges cannot guarantee these results any more than they can guarantee that any particular defendant will be deterred from committing future crimes. The uncertainty inherent in predicting the future does not require judges to ignore deterrence or targeted treatment programs

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[9] The sentencing judge had good reason to believe that petitioner would enter RDAP. Congress meant to make the program available to all defendants with drug addictions and enough time left on their sentences. 18 U.S.C. § 3621(e)(1)(C); 28 C.F.R. § 550.53(b) (2009). While petitioner claims that the Bureau of Prisons did not give her access to RDAP (Pet'r Br. 7, 43), it is unclear why she would have been ineligible. Petitioner mistakenly argues that her prior weapons-possession conviction might have disqualified her from the program, citing Bureau of Prisons regulations. Pet'r Br. 44 n.32 (citing 28 C.F.R. § 550.55(b)(5)(ii) (2009)). Those regulations deny eligibility only for the one-year sentence reduction, not for the RDAP program itself. And they apply only to a *current* felony weapons conviction, not a prior one. Nothing in petitioner's criminal history would prevent her from enrolling in the program. *See* Drug Abuse Treatment Program, 74 Fed. Reg. 1892, 1895 (Bureau of Prisons Jan. 14, 2009) (to be codified at 28 C.F.R. pts. 545 & 550) ("[I]nmates [convicted of violent crimes] are not precluded from participating in the drug abuse treatment program.").

altogether. It merely calls for appropriate caution and the additional check of appellate review.

Furthermore, the government acknowledges that sentencing judges can and must make such predictions. Judges, the government admits, can consider the need for treatment in deciding whether to incarcerate defendants for violating the conditions of supervised release. 18 U.S.C. § 3583(e)(3); U.S. Br. 25 n.5. Nothing in § 3621 or § 3583, however, guarantees sentencing judges control over defendants' placement in RDAP after a supervised-release violation, any more than after an initial sentence of imprisonment. The government's logic compels the conclusion that judges may weigh targeted treatment programs in both scenarios.

II. Even if the Act Discourages Sole Reliance on Targeted Treatment Programs, It Does Not Forbid Their Consideration, Particularly as One of Several Factors

Section 3582(a)'s "recognizing" clause does nothing more than warn judges against the lure of the rehabilitative ideal's siren song. Even if Congress intended it to reach more broadly, at most it meant to discourage basing prison sentences *solely* on targeted treatment programs. Congress did not forbid judges to consider them, particularly as one factor among others. On the contrary, the Act encourages judges to consider treatment as one factor among others.

1. The structure of the Act confirms that Congress knew how to enact a categorical bar when it wanted to do so.

a. For example, Congress categorically barred the Sentencing Commission from considering particular factors in drafting the Guidelines. With respect to a defendant's "race, sex, national origin, creed, and socioeconomic status," Congress insisted that the Sentencing Commission "*shall* assure" that its guidelines and policy statements are "*entirely* neutral." 28 U.S.C. § 994(d) (emphases added). The phrases "shall assure" and "entirely neutral" stand in stark contrast to § 3582(a)'s language of cognitive guidance ("recognizing"). Congress could easily have phrased § 3582(a) similarly, or added: "The court shall not impose or lengthen a term of imprisonment to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment." That is not the statute Congress enacted. *Cf. United States* v. *Duran*, 37 F.3d 557, 561 (9th Cir. 1994).

b. Other subsections of § 994 direct that the Sentencing Commission, as opposed to sentencing judges, "shall assure that the guidelines" reflect particular policies or achieve particular results. *See* 28 U.S.C. § 994(e), (h), (i), (n); *accord id.* § 994(j), (k), (*l*), (m) ("shall insure"); § 994(v) ("shall ensure").[10]

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[10] In other subsections of § 994, Congress used the phrase "shall consider" to leave the Commission discretion to decide

(Continued on following page)

Section 3582(a), in contrast, does not require sentencing judges to "assure," "insure," or "ensure" any particular rule or result. It merely guides their decisionmaking, requiring only that they "consider" the inappropriateness of the rehabilitative ideal. Congress was more willing to prescribe or proscribe that the Commission adopt across-the-board policies

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whether to treat certain factors as relevant. *See* 28 U.S.C. § 994(c) (the Commission "shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance . . . ."); *accord id.* § 994(d); *cf.* 18 U.S.C. § 3582(a) (sentencing judge "shall consider").

Several of § 994's subsections instruct the Sentencing Commission that it "shall assure that the guidelines . . . reflect the general inappropriateness" of certain factors. 28 U.S.C. § 994(e); *accord id.* § 994(*l*)(2) ("shall insure"). The government argues that by omitting "general" from § 3582(a), Congress signaled that it was enacting a categorical bar. U.S. Br. 22-23. It is hazardous, however, to compare the guidance Congress gave the Sentencing Commission to the guidance § 3582(a) gives to judges imposing sentences in individual cases. Congress was more willing to constrain the Commission's rule-writing than judicial discretion to customize specific sentences. *See supra* pp. 9-10 (explicating the Act's distinction between the roles of the Commission and sentencing judges). That is particularly true since, as the text notes, the Commission "shall assure" certain outcomes while judges merely "shall consider" all four factors while "recognizing" that imprisonment itself is inappropriate. The phrase "not . . . appropriate" in § 3582(a) may be more restrictive than the phrase "general[ly] inappropriat[e]" in § 994(e) & (*l*)(2), but it is less restrictive than the phrase "entirely neutral" in § 994(d). If it applies to targeted treatment programs at all, § 3582(a)'s phrase "not . . . appropriate" adopts at most an intermediate level of guidance, not a categorical ban.

and rules. Section 3582(a)'s cognitive phrasing acknowledges a judge's distinctive role in weighing case-specific factors, tailoring particular sentences, and providing reasons in the course of developing sentencing case law.

c. Even if Congress meant to discourage or prevent sentencing judges from imprisoning defendants *solely* to treat them, Congress permitted judges to weigh targeted treatment programs as *one* factor among others.[11]

The Act instructs the Sentencing Commission (not judges) to enact guidelines reflecting "the inappropriateness of imposing a sentence to a term of imprisonment for *the* purpose of rehabilitating the defendant or providing . . . correctional treatment." 28 U.S.C. § 994(k) (emphasis added). Petitioner concedes that it "may seem more natural" to read § 994(k)'s legislative history as forbidding "the imposition of imprisonment only when rehabilitation is the 'sole' purpose that incarceration would serve." Br. 50 n.33; *see also United States* v. *Manzella*, 475 F.3d 152, 161 (3d Cir. 2007) (forbidding judges to lengthen prison

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[11] The government acknowledges that "the court can express its hope that the defendant will receive treatment while incarcerated or note that an otherwise validly imposed term of imprisonment will provide the collateral benefit that the defendant will receive treatment." U.S. Br. 26. That insight is correct but incomplete. Appellate courts should not have to police the shadowy line between judges' expressed hopes and sentencing factors.

terms "for the sole purpose of rehabilitation"); *Shum* v. *Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010) (stressing the singular, exclusive import of the definite article "the"). If the Sentencing Commission may consider targeted treatment programs as one factor among many in formulating guidelines, a fortiori sentencing judges may do so when tailoring sentences to individual defendants' treatment needs.

Likewise, Congress instructed the Sentencing Commission that "[r]ehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason" for later reducing the defendant's sentence. 28 U.S.C. § 994(t) (emphasis added). That provision reflects Congress's rejection of the Rehabilitation Model, under which proof of rehabilitation alone could ultimately shorten a sentence.[12] Even in that scenario, however, Congress understood that judges could weigh defendants' rehabilitation not "alone" but among other factors. *See United States* v. *Jimenez*, 605 F.3d 415, 423-24 (6th Cir. 2010) (affirming sentence where judge acknowledged defendant's

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[12] The Senate Report notes that this provision, formerly § 994(s), is "consistent with the rejection by the Committee of the rehabilitation theory as the basis for determining the length of a term of imprisonment." Senate Report at 179. Petitioner and the government overread the quoted phrase as rejecting rehabilitation as a judicial sentencing factor. Pet'r Br. 52; U.S. Br. 36. In context, this phrase simply notes that Congress rejected the Rehabilitation Model's procedures, in which courts imposed indeterminate sentences and parole boards dictated back-end sentence reductions based solely on evidence of eventual rehabilitation. *Supra* pp. 6-9.

individual need for medical and mental health treatment along with the other § 3553 factors). Here, the sentencing judge rightly weighed the relevant factors, considering deterrence, retribution, protection of the public, and the need for targeted drug treatment, to arrive at a suitable sentence.

2. Similarly, the Act's legislative history reflects that at most Congress intended to discourage sole reliance on targeted treatment programs as the goal of prison sentencing, not to ban their consideration.

a. In its section-by-section analysis of § 3582, the Senate Report stated that the "recognizing" clause, though not a prohibition, had some hortatory force: "This *caution* concerning the use of rehabilitation as a factor to be considered in imposing sentence is to *discourage* the employment of a term of imprisonment on the sole ground that a prison has a program that might be of benefit to the prisoner." Senate Report at 119 (emphases added). Other sections of the report reiterate this language of caution rather than blanket prohibition. "[I]n situations in which rehabilitation is the *only* appropriate purpose of sentencing, that purpose *ordinarily may* be *best* served by release on probation subject to certain conditions." *Id.* at 92 (emphases added). "[W]hen the purpose of sentencing is to provide the educational opportunity, vocational training, or other correctional treatment required for rehabilitation, given the current state of knowledge, probation is *generally* considered to be *preferable* to

imprisonment." *Id.* at 91 (emphases added). Thus, if the "recognizing" clause applies to targeted treatment programs at all, at most it offers guidance rather than imposing an outright ban.

b. The Senate Report affirmatively embraces a sentencing judge's consideration of targeted treatment as one factor among others in prison sentencing. As the examples quoted above show, Congress discouraged imprisonment "on the *sole* ground" of correctional treatment, where rehabilitation is "*the* purpose of sentencing" or "the *only* appropriate purpose of sentencing." *Id.* at 119, 91, 92 (emphases added); *accord id.* at 172 n.410 ("[A] defendant should not be sent to prison *only* because the prison has a program that 'might be good for him'" (emphasis added)).[13]

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[13] Footnote 410 of the Senate Report begins: "[I]f an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation . . . ." Senate Report at 171 n.410. "This qualifying language in [28 U.S.C. § 994](d), when read with the provisions in proposed section 3582(a) of title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the *sole* purpose of rehabilitation, makes clear that a defendant should not be sent to prison *only* because the prison has a program that 'might be good for him.'" *Id.* at 171-72 n.410 (emphases added). In quoting the latter sentence, the government emphasizes the word "precludes." U.S. Br. 36. One cannot put so much emphasis, however, on a single word in a committee-report footnote more than forty pages from the section-by-section analysis of the provision it purports to interpret. *See* Senate Report at 119; *supra* p. 48 (noting that the section-by-section analysis of § 3582(a) is to the contrary).

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Where another purpose of sentencing authorizes imprisonment, consideration of targeted treatment programs is undoubtedly appropriate. As the Senate Report noted in parsing § 3582(a), sometimes imprisonment may "be appropriate to serve only one or two of the listed purposes of sentencing." *Id.* at 119. "[I]f imprisonment is found to be justified for any one of the purposes, except as noted [in the "recognizing" clause], its imposition is authorized under this section. In such a case, whether it should be imposed when authorized is a question to be resolved after balancing *all* the relevant considerations." *Id.* (emphasis added); *accord id.* at 176 ("A term [of imprisonment] imposed for another purpose of sentencing may, however, have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence.").

Targeted treatment programs, Congress understood, would remain one of "the relevant considerations" and "an appropriate secondary purpose" in prison sentencing. *Id.* at 119, 176. Here, a three-year

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Regardless, the word "precludes" cannot bear the weight the government places on it. It is singular, referring back to the immediately preceding antecedent, namely § 994(k)'s directive to the Sentencing Commission, not judges. Even if it does apply with equal force to judges, as long as rehabilitative need is not the "only" or "the sole purpose" in "sen[ding a defendant] to prison," judges may freely weigh it. That is particularly true where an offense "warrant[s] imprisonment for some other purpose of sentencing." *See* Pet'r Br. 50 n.33 (acknowledging that this reading "may seem more natural").

mandatory minimum sentence applied. 8 U.S.C. § 1324(a)(2)(B)(ii). Thus, Congress had already decided by statute that other considerations required imprisonment. That decision did not foreclose the sentencing judge from considering rehabilitation in adjusting the length of petitioner's term, particularly as he imposed a sentence within the guideline range.

The section-by-section analysis of § 3582(a) flatly contradicts petitioner's and the government's position. It describes the "recognizing" clause as a mere "caution . . . to discourage" judges from relying on a defendant's need for treatment as "the sole ground" for imprisonment. Senate Report at 119. Congress thus accepted that sentencing judges may use imprisonment to facilitate providing targeted prison treatment programs in at least some circumstances. Judges may consider treatment even as the sole ground for imprisonment and certainly as one of several factors.

Petitioner and the government, in stark contrast, read the "recognizing" clause as categorically forbidding imprisonment on these grounds. The Senate Report could easily have described § 3582(a) as adopting a *rule* (not a caution) that the "recognizing" clause *forbids* (not discourages) using imprisonment based even *in part* (not solely) on a treatment program. Had Congress intended the statute to mean what petitioner and the government say it does, the Senate Report would not have analyzed that clause as it did.

III. Even if District Courts May Not Consider Targeted Treatment Programs at All in Determining Whether to Impose Imprisonment, They May Consider Them in Setting the Length and Term of Imprisonment

As discussed above, § 3582(a) simply cautions judges against reviving the discredited rehabilitative ideal both in imposing and in lengthening prison terms. It does not forbid consideration of targeted treatment programs, especially in a case such as this one where treatment was only one of several factors informing the judge's decision. Even assuming arguendo that this analysis does not hold when sentencing judges are deciding whether to imprison, it applies at least when a judge has already decided to imprison and is determining the length of the prison term. Here, for example, the sentencing judge had to imprison petitioner because of the three-year mandatory minimum sentence; he had discretion to adjust only the length of her term.

A. In the first clause of § 3582(a), Congress carefully distinguished between "determining whether to impose a term of imprisonment" and "determining the length of the term." But it referred to just one of these determinations in the "recognizing" clause, mentioning only "imprisonment." The first, primary meaning of "imprisonment" is "the act of confining a person, esp. in a prison." *Black's Law Dictionary* at 773. "The state of being confined; a period of confinement" is a secondary meaning that Congress is less likely to have intended. *Id.*

B. Two related provisions in the Act confirm that Congress limited the "recognizing" clause to sentencing judges' decisions whether to imprison, not decisions to lengthen prison terms. First, 28 U.S.C. § 994(k) directs the Commission to avoid relying on "*the* purpose of rehabilitating the defendant" when promulgating guidelines that authorize imprisonment but not when adjusting the length of prison terms. In the other subsections of § 994, Congress repeatedly distinguished between "the imposition of sentences" and "the length of a term." 28 U.S.C. § 994(c), (d); *see also id.* § 994(e) (distinguishing "a term of imprisonment" from the "length of a term of imprisonment").

But in § 994(k), Congress discouraged as "inappropriate" the Commission's sole reliance on rehabilitation only in "imposing a sentence to a term of imprisonment," not in adjusting the length of the term. If Congress left the Commission this much flexibility to promulgate broad rules, a fortiori it meant to leave judges at least as much "flexibility to [tailor] individualized sentences" to each case and each defendant's needs. 28 U.S.C. § 991(b)(1)(B). The distinction Congress drew in this provision confirms that in the "recognizing" clause, Congress understood "imprisonment" to apply only to the initial decision to imprison, not to the duration of imprisonment. *See United States* v. *Jackson*, 70 F.3d 874, 879-80 (6th Cir. 1995); *United States* v. *Duran*, 37 F.3d 557, 561 (9th Cir. 1994); *see also United States* v. *Hawk Wing*, 433 F.3d 622, 630 (8th Cir. 2006).

Second, nothing in the Act limits a sentencing judge's discretion to lengthen a term of imprisonment by imposing consecutive sentences pursuant to 18 U.S.C. § 3584(b). That section closely tracks the language of § 3582(a), providing that "[t]he court, in determining whether" to impose consecutive sentences, "shall consider" "the factors set forth in section 3553(a)." 18 U.S.C. § 3584(b). While a consecutive-sentencing decision is, in substance, a decision to lengthen the term of imprisonment served, § 3584(b) contains no qualification akin to the "recognizing" clause in § 3582(a). Congress's decision not to include such a clause in a parallel and functionally similar provision strongly suggests that § 3582(a)'s guidance applies at most to the decision whether to imprison, not to setting the prison term's length.

C. The legislative history likewise reflects Congress's understanding that the "recognizing" clause governs only the initial decision to imprison. In its section-by-section analysis of § 3582, the Senate Report described subsection (a) as specifying "that the judge should recognize, in determining *whether* to impose a term of imprisonment, 'that imprisonment is not an appropriate means of promoting correction and rehabilitation.'" Senate Report at 119 (emphasis added). That sentence referred verbatim to only one of the two determinations described in § 3582(a)'s first phrase – "whether to impose a term of imprisonment," but not "the length of the term." Congress did not intend the "recognizing" clause to apply to the decision setting a prison term's length. *United States*

v. *Giddings*, 37 F.3d 1091, 1096 & n.17 (5th Cir. 1994).

Once any other purpose of sentencing "authorize[s]" imposing imprisonment, judges may "balanc[e] all the relevant considerations" in imposing and lengthening the prison term. Senate Report at 119. "A term imposed for another purpose of sentencing may [thus] have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence." *Id.* at 176; *see also supra* pp. 49-50 & n.13.

In response, the government cites a contrary footnote more than fifty pages earlier in the report. U.S. Br. 37 (citing Senate Report at 67 & n.140). But in voting on the bill, members of Congress presumably relied on the section-by-section analysis of § 3582 for their understanding of § 3582(a), rather than on a footnote to the discussion of § 3551.[14]

D. There are significant practical differences between imprisoning someone solely to rehabilitate

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[14] Likewise, the section-by-section analysis of the enacted bill better describes Congress's intent than two committee reports explaining different sections of two unenacted bills three and six years earlier. *Cf.* U.S. Br. 32, 34-35 (relying on S. Rep. No. 605, 95th Cong., 1st Sess. 883, 891, 1168 (1977) and S. Rep. No. 553, 96th Cong., 2d Sess. 942 (1980)). Far from accurately describing the enacted bill, the language the government quotes from these reports was omitted from the final report on the enacted bill. That omission signals that Congress had repudiated, or at least ignored, that language.

her and determining the length of her prison term in part to facilitate treatment. *Contra* Pet'r Br. 37-39; U.S. Br. 28. The effects of imprisonment plateau a short while after the initial incarceration. "[T]he difference in harm between longer and shorter prison terms is smaller than typically assumed . . . ." John Bronsteen et al., *Happiness and Punishment*, 76 U. Chi. L. Rev. 1037, 1039 (2009). Thus, it is more reasonable to weigh targeted treatment programs as a factor in lengthening a prison term than in imposing one in the first place.

IV. The Rule of Lenity Does Not Dictate a Different Result

The rule of lenity, which petitioner invokes (Pet'r Br. 59-65), is inapposite here. The rule applies only to the rare criminal statute that contains a "grievous ambiguity or uncertainty such that the Court must simply guess as to what Congress intended." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508-09 (2010) (internal quotation marks and citation omitted). Disagreement among lower courts about a statute's meaning does not necessitate applying the rule of lenity. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). The rule is not "an overriding consideration of being lenient to wrongdoers," but rather an interpretive tool that "comes into operation at the end of the process of construing what Congress has expressed." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). It operates only if the statute remains deeply ambiguous even

after considering its "text, structure, history, and purpose." *Barber*, 130 S. Ct. at 2508.

Section 3582(a) contains no "grievous ambiguity" that would trigger the rule. The Sentencing Reform Act's text, structure, history, and purpose all indicate that Congress intended to reject the rehabilitative ideal's ambition to cure every inmate through isolation and prison routines and the Rehabilitation Model's opaque, unpredictable procedures. Congress did not, however, mean to bar a sentencing judge from considering targeted treatment programs, particularly as one of many factors in setting the length of a prison term.

Furthermore, the rule of lenity's primary concern is providing fair warning about the scope of the criminal law and its penalties. *See Liparota* v. *United States*, 471 U.S. 419, 427 (1985); *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (analogizing the rule of lenity to the void-for-vagueness doctrine). Here, petitioner had clear warning that smuggling illegal aliens violated federal law and that the sentencing guidelines prescribed 41 to 51 months' imprisonment. She had fair notice that she might receive a sentence anywhere within that range, as she did.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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